



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

Extraordinary Chambers in the Courts of Cambodia  
Chambres extraordinaires au sein des tribunaux cambodgiens

Kingdom of Cambodia  
Nation Religion King  
Royaume du Cambodge  
Nation Religion Roi

**អង្គបុរេជំនុំជម្រះ**

Pre-Trial Chamber  
Chambre Préliminaire

D165/2/26

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*

Case File No. 003/07-09-2009-ECCC/OCIJ (PTC28)

**THE PRE-TRIAL CHAMBER**

**Before:** Judge PRAK Kimsan, President  
Judge Olivier BEAUVALLET  
Judge NEY Thol  
Judge Kang Jin BAIK  
Judge HUOT Vuthy

**Date:** 13 September 2016

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**PUBLIC REDACTED**

**DECISION RELATED TO (1) [REDACTED] APPEAL AGAINST DECISION ON NINE APPLICATIONS TO SEIZE THE PRE-TRIAL CHAMBER WITH REQUESTS FOR ANNULMENT AND (2) THE TWO ANNULMENT REQUESTS REFERRED BY THE INTERNATIONAL CO-INVESTIGATING JUDGE**

**Co-Prosecutors**

Ms CHEA Leang  
Mr Nicholas KOUMJIAN

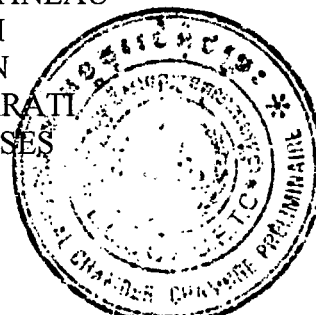
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**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of “██████████ Appeal Against International Co-Investigating Judge’s Decision on ██████████ Nine Applications to Seize The Pre-Trial Chamber With Requests for Annulment Pursuant to Internal Rule 76(2)”<sup>1</sup> entered by ██████████ Co-Lawyers (“Co-Lawyers”) on 13 January 2016 (“Appeal”) and two applications for annulment, referred by the International Co-Investigating Judge that same day,<sup>2</sup> entitled “██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges Concerning Alleged Purges in Kratie (Sector 505) in Late 1978”<sup>3</sup> and “██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches”.<sup>4</sup>

### I – PROCEDURAL BACKGROUND

1. On 7 September 2009, the International Co-Prosecutor filed the Second Introductory Submission Regarding the Revolutionary Army of Kampuchea (“RAK” and “Introductory Submission”, respectively), whereby he moved the Co-Investigating Judges to investigate a number of crimes allegedly committed by ██████████ and another suspect.<sup>5</sup>
2. On 3 December 2008, a disagreement between the Co-Prosecutors on two fresh introductory submissions and one supplementary submission was brought before the Pre-Trial Chamber.<sup>6</sup> The International Co-Prosecutor requested that the case file be forwarded to the Co-Investigating Judges, to which the National Co-Prosecutor objected. On 18 August 2009, the Pre-Trial Chamber ruled that as it had not been in a position to achieve the requisite majority of four affirmative votes, the case file could be forwarded to the Co-

<sup>1</sup> ██████████ Appeal Against International Co-Investigating Judge’s Decision on ██████████ Nine Applications to Seize The Pre-Trial Chamber With Requests for Annulment Pursuant to Internal Rule 76(2), 13 January 2016, D165/2/3 (“Appeal”).

<sup>2</sup> Decision on ██████████ Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment pursuant to Internal Rule 76(2), 4 November 2015, D165 (“Impugned Decision”), para. 20; Forwarding Copy of Case-File 003 to the Pre-Trial Chamber Pursuant to Case File 003-D165, 4 November 2015, D165/1.

<sup>3</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges Concerning Alleged Purges in Kratie (Sector 505) in Late 1978, 21 May 2015, D137 (“Kratie Application”).

<sup>4</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches, 29 July 2015, D146 (“Grave Breaches Application”).

<sup>5</sup> Second Introductory Submission (Revolutionary Army of Kampuchea), 20 November 2008, D1 (“Introductory Submission”); Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

<sup>6</sup> International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1.



Investigating Judges pursuant to Internal Rule 74(1).<sup>7</sup>

3. In the course of the investigation, the Co-Investigating Judges issued five forwarding orders to clarify the allegations laid before them.<sup>8</sup> On each occasion, the case file was forwarded to the Co-Prosecutors pursuant to Internal Rule 53 so that they could ascertain the ambit of the allegations laid before the Co-Investigating Judges as regards the new facts and determine whether to seise the Co-Investigating Judges by way of a supplementary submission.

4. Further to each order, the International Co-Prosecutor informed the Co-Investigating Judges, either that he considered the facts which were the subject of the forwarding orders fell within the scope of the judicial investigation, and accordingly that a supplementary submission was unnecessary,<sup>9</sup> or that he declined to widen the allegations laid before the Co-Investigating Judges where the facts fell outwith the judicial investigation.<sup>10</sup>

5. On 31 October 2014, the International Co-Prosecutor filed a supplementary submission, which somewhat clarified the Introductory Submission and moved the Co-Investigating Judges to widen their investigations to encompass allegations of further crimes (“Supplementary Submission”).<sup>11</sup>

6. On 3 March 2015, the Co-Investigating Judge charged ██████████ *in absentia* and gave him access to the case file.<sup>12</sup>

7. On 21 May 2015, the Co-Lawyers filed a first application with the Co-Investigating Judges, moving them to seise the Pre-Trial Chamber with a request for annulment of all investigative action concerning the purges in Kratie (Sector 505) in late 1978 (“Kratie

<sup>7</sup> Disagreement no. 001/18-11-2008-ECCC/PTC, Considerations of the Pre-Trial Chamber regarding the Disagreement between the Co-Prosecutors pursuant to Internal Rule 71, 18 August 2009, para. 45.

<sup>8</sup> Request for Clarification in Case 003, 8 February 2011, D1/2; Forwarding Order, 24 April 2012, D47; Forwarding Order, 4 May 2012, D50; Forwarding Order, 9 June 2014, D102; Forwarding Order, 27 June 2014, D105.

<sup>9</sup> International Co-Prosecutor’s Response to Forwarding Order of 24 April 2012, 21 June 2012, D47/1, para. 10; International Co-Prosecutor’s Response to Forwarding Order Regarding Toek Sab Prison, 20 June 2014, D102/1, para. 3.

<sup>10</sup> Response of International Co-Prosecutor to Request for Clarification, 16 February 2011, D1/2/1, paras 2-3; Co-Prosecutors’ Response to Forwarding Order of 4 May 2012, 25 May 2012, D50/1, paras 9-10; International Co-Prosecutor’s Response to Forwarding Order D105 Regarding Security Centres 808, 809 & 810, 1 July 2014, D105/1, para. 3.

<sup>11</sup> International Co-Prosecutor’s Supplementary Submission Regarding Crime Sites Related to Case 003, 31 October 2014, D120 (“Supplementary Submission”).

<sup>12</sup> Decision to Charge ██████████ in Absentia, 3 March 2015, D128, para. 76.



Application”).<sup>13</sup>

8. On 21 May 2015, the Co-Lawyers filed a second application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action concerning the Kang Keng forced labor and reeducation sites (“Kang Keng Application”).<sup>14</sup>

9. On 21 May 2015, the Co-Lawyers filed a third application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action concerning Tuek Sap (“Tuek Sap Application”).<sup>15</sup>

10. On 22 May 2015, the Co-Lawyers filed a fourth application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action connected to the interviews of Witnesses D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15 (“Witness Interview Application”).<sup>16</sup>

11. On 25 May 2015, the Co-Lawyers filed a fifth application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action concerning Ream (“Ream Application”).<sup>17</sup>

12. On 22 July 2015, the Co-Lawyers filed a sixth application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action connected to Witness ██████████ (“██████████ Application”).<sup>18</sup>

13. On 29 July 2015, the Co-Lawyers filed a seventh application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of the charges of grave breaches of the Geneva Conventions (“Grave Breaches

<sup>13</sup> Kratie Application.

<sup>14</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Alleged Kang Keng Forced Labor and Reeducation Sites, 21 May 2015, D139 (“Kang Keng Application”).

<sup>15</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Tuek Sap, 21 May 2015, D138 (“Tuek Sap Application”).

<sup>16</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Conducted in Relation to Witness Interviews D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15, 22 May 2015, D140 (“Witness Interview Application”).

<sup>17</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Ream, 25 May 2015, D141 (“Ream Application”).

<sup>18</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Conducted in Relation to Witness ██████████, 22 July 2015, D144 (“██████████ Application”).



Application”).<sup>19</sup>

14. On 16 September 2015, the Co-Lawyers filed an eighth application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of all investigative action connected to forced marriage (“Forced Marriage Application”).<sup>20</sup>

15. On 21 September 2015, the Co-Lawyers filed a ninth application with the Co-Investigating Judges, moving them to seize the Pre-Trial Chamber with a request for annulment of document D54/81 and its attachments (“D54/81 Application”).<sup>21</sup>

16. On 3 November 2015, the International Co-Investigating Judge declined to seize the Pre-Trial Chamber with some of the requests for annulment, but referred two (“Impugned Decision”).<sup>22</sup> The decision was notified in English on 4 November 2015 and in Khmer on 3 December 2015. On 4 November 2015, the Pre-Trial Chamber received a letter from the Co-Investigating Judges’ Greffier<sup>23</sup> advising the Bench of the forwarding of a copy of Case File 003 for its determination of the two requests for annulment referred: the Kratie Application<sup>24</sup> and the Grave Breaches Application.<sup>25</sup>

17. Notice of appeal was filed on 6 November 2015.<sup>26</sup> On 20 November 2015, the Co-Lawyers sought the leave of the Pre-Trial Chamber to file their appeal within 30 days of receipt of the English and Khmer versions of the decision on the Co-Lawyers’ appeal against the International Co-Investigating Judge’s decision on [REDACTED] application to seize the Pre-Trial Chamber with two requests for annulment.<sup>27</sup> The International Co-Prosecutor took

<sup>19</sup> Grave Breaches Application.

<sup>20</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Conducted in Relation to Forced Marriage, 16 September 2015, D151 (“Forced Marriage Application”).

<sup>21</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of Document D54/81 and its Attachments, 21 September 2015, D153 (“D54/81 Application”).

<sup>22</sup> Impugned Decision.

<sup>23</sup> Letter from the Office of the Co-Investigating Judges, 4 November 2015, D165/1.

<sup>24</sup> Kratie Application.

<sup>25</sup> Grave Breaches Application.

<sup>26</sup> [REDACTED] Notice of Appeal Against the International Co-Investigating Judge’s Decision on [REDACTED] Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment Pursuant to Internal Rule 76(2), 5 November 2015, D165/2.

<sup>27</sup> [REDACTED] Request to file Appeal Against International Co-Investigating Judge’s Decision on [REDACTED] Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment Pursuant to Internal Rule 76(2) after Receipt of the Pre-Trial Chamber’s Decision on D134/1/1, 20 November 2015, D165/2/1. *See also* [REDACTED] Appeal Against Co-Investigating Judge HARMON’s Decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Requests for Annulment of Investigative



no objection to the Co-Lawyers' motion,<sup>28</sup> which the Pre-Trial Chamber allowed on 2 December 2015.<sup>29</sup>

18. The Co-Lawyers filed their Appeal on 13 January 2016.<sup>30</sup> The International Co-Prosecutor responded to the Appeal on 8 February 2016 ("Response to Appeal") and, as directed by the Chamber, filed nine responses to the applications for annulment that same day.<sup>31</sup>

19. The Co-Lawyers filed their replies to the International Co-Prosecutor's responses on 23 February 2016.<sup>32</sup>

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Action, 18 May 2015, D134/1/1.

<sup>28</sup> International Co-Prosecutor's Response to ██████████ Request for Extension of Time to File Appeal, 30 November 2015, D165/2/2.

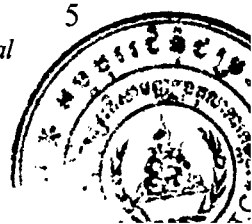
<sup>29</sup> PTC28/003, Pre-Trial Chamber Instructions to the parties by email, 2 December 2015, 1.57 pm.

<sup>30</sup> Appeal.

<sup>31</sup> International Co-Prosecutor's Response to ██████████ Appeal Against the International Co-Investigating Judge's Decision on Nine Applications for Annulment, 8 February 2016, D165/2/8 ("Response to Appeal"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Document D54/81 and its Attachments, 8 February 2016, D165/2/9 ("Response to D54/81 Application"); International Co-Prosecutor's Response on the Merits of ██████████ Request to Annul All Investigative Action Conducted in Relation to Forced Marriage, 8 February 2016, D165/2/10 ("Response to Forced Marriage Application"); International Co-Prosecutor's Response on the Merits of ██████████ Request to Annul All Investigative Action Conducted in Relation to Witness ██████████, 8 February 2016, D165/2/11 ("Response to ██████████ Application"); International Co-Prosecutor's Response on the Merits to ██████████ Request to Annul All Investigative Action Conducted in Relation to Witness Interviews D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14, and D32/15, 8 February 2016, D165/2/12 ("Response to Witness Interview Application"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches, 8 February 2016, D165/2/13 ("Response to Grave Breaches of the Geneva Conventions Application"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Ream, 8 February 2016, D165/2/14 ("Response to Ream Application"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Action Concerning Toek Sap, 8 February 2016, D165/2/15 ("Response to Tuek Sap Application"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Kang Keng Forced Labour and Reeducation Sites, 8 February 2016, D165/2/16 ("Response to Kang Keng Application"); International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Action and Charges Concerning Purges in Kratie (Sector 505) in Late 1978, 29 February 2016, D165/2/17 ("Response to Kratie Application").

<sup>32</sup> ██████████ Reply to International Co-Prosecutor's Response to ██████████ Appeal Against the International Co-Investigating Judge's Decision on Nine Applications for Annulment, 23 February 2016, D165/2/19 ("Reply"); ██████████ Reply to the International Co-Prosecutor's Responses on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of Charges of Grave Breaches, 23 February 2016, D165/2/20 ("Grave Breaches of Geneva Conventions Reply"); ██████████ Consolidated Reply to International Co-Prosecutor's Response on the Merits of ██████████ Request to Annul All Investigative Action Conducted in Relation to Witness ██████████ & International Co-Prosecutor's Response on the Merits of ██████████ Request to Annul All Investigative Action Conducted in Relation to Witness Interviews D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14, and D32/15, 23 February 2016,

*Decision Related to (1) ██████████ Appeal Against Decision on Nine Applications to Seize the Pre-Trial Chamber With Requests for Annulment and (2) the Two Requests for Annulment Referred by the International Co-Investigating Judge*



## II – THE APPEAL

20. The Pre-Trial Chamber is in principle seised in respect of annulment by virtue of an order of the Co-Investigating Judges, issued of their own motion pursuant to Internal Rule 76(1); a motion for annulment brought by the parties acting pursuant to Internal Rule 76(2); or an appeal entered under Internal Rule 74(3)(g) against a decision of the Co-Investigating Judges declining to refer an application for annulment.

21. In the Impugned Decision, the International Co-Investigating Judge referred to the Pre-Trial Chamber two requests for annulment from the Co-Lawyers for [REDACTED], but declined to refer the remaining seven.<sup>33</sup> The Co-Lawyers appeal that ruling. They pray the Pre-Trial Chamber to vacate the Impugned Decision and consider itself seised of all nine annulment applications or, in the alternative, vacate that part of the Decision on the applications concerning Kang Keng, Tuek Sap and Ream and the investigative action to which they make reference.

### A. Admissibility of the Appeal

22. The Co-Lawyers submit that the Appeal is admissible under Internal Rule 74(3)(g) and Internal Rule 21.<sup>34</sup> The International Co-Prosecutor does not challenge the admissibility of the Appeal under Internal Rule 74 (3)(g).<sup>35</sup>

23. The Pre-Trial Chamber agrees that the Appeal was entered against a decision denying, *inter alia*, seven applications to seise the Pre-Trial Chamber in respect of annulment of procedural action and is hence admissible under Internal Rule 74 (3)(g), which provides:

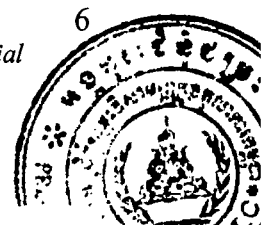
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D165/2/21 (“[REDACTED] and Witness Interview Reply”); [REDACTED] Consolidated Reply to the International Co-Prosecutor’s Responses on the Merits of [REDACTED] Applications to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Action Concerning Ream, Tuek Sap, and Kang Keng, 23 February 2016, D165/2/22 (“Ream, Tuek Sap and Kang Keng Reply”); [REDACTED] Reply to the International Co-Prosecutor’s Response on the Merits of [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of Document D54/81 and its Attachments, 23 February 2016, D165/2/23 (“D54/81 Reply”); [REDACTED] Reply to International Co-Prosecutor’s Response on the Merits of [REDACTED] Request to Annul All Investigative Action Conducted in Relation to Forced Marriage, 23 February 2016, D165/2/24 (“Forced Marriage Reply”); [REDACTED] Reply to the International Co-Prosecutor’s Response on the Merits of [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Action and Charges Concerning Alleged Purges in Kratie (Sector 505) in Late 1978, 2 March 2016, D165/2/25 (“Kratie Reply”).

<sup>33</sup> Impugned Decision, disposition.

<sup>34</sup> Appeal, paras 8 and 9.

<sup>35</sup> Response to Appeal, para. 12.



3. The Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges: [...]

g) refusing an application to seize the Chamber for annulment of investigative action; [...].

24. The Pre-Trial Chamber further notes that the Co-Lawyers filed notice of appeal within the time laid down by Internal Rule 75(1) and the Appeal as per its instructions.<sup>36</sup>

25. Accordingly, the Pre-Trial Chamber finds the Appeal admissible.

#### **B. Criteria for laying annulment applications before the Pre-Trial-Chamber**

26. The International Co-Investigating Judge laid down the standard to be applied to applications to seize the Pre-Trial Chamber:<sup>37</sup>

To grant annulment applications made pursuant to Internal 76(2), the [Co-Investigating Judges] need only be satisfied that the applications are supported by reasoned arguments making assertions that (i) there have been procedural defects, and (ii) such defects infringe the rights of [REDACTED]. This involves determination of whether the applications make an “arguable case”, and does not require examination of the merits of the applications. Factors I take into consideration below when determining whether the Defence have made an “arguable case” include whether the Defence have identified the alleged procedural defects and related infringement of rights with sufficient specificity so as to permit identification of the investigative acts to be annulled. I also consider whether the arguments made in support of the application are logically consistent, reasoned and raise an arguable contention.

27. In determining whether the International Co-Investigating Judge erred in declining to refer certain requests for annulment, and before it turns to the merits, the Pre-Trial Chamber will set out the applicable law and the criteria that form the basis of the Co-Investigating Judges’ screening role.

##### 1. Submissions of the parties

28. The Co-Lawyers maintain that the International Co-Investigating Judge erred in law by refusing to seize the Pre-Trial Chamber, whereas he had in fact acknowledged that the

<sup>36</sup> See PTC28/003, Pre-Trial Chamber’s instructions to the parties by email, 2 December 2015, 1.57 pm.

<sup>37</sup> Impugned Decision, para. 14 [references omitted].





requests identified a procedural defect and an infringed fair trial right.<sup>38</sup> The Co-Lawyers take issue with the International Co-Investigating Judge's determining whether the assertions advanced were "reasonable" or raised "arguable contentions", whereby he determined the admissibility and merits of the requests for annulment.<sup>39</sup> By so proceeding, the International Co-Investigating Judge, it is submitted, acted *ultra vires*, as his authority should be confined to determining whether each request sets out an "arguable case" on procedural defect and the ensuing prejudice.<sup>40</sup> The Co-Lawyers assert that such determination of the merits is the preserve of the Pre-Trial Chamber,<sup>41</sup> which under the Internal Rules, has sole jurisdiction to dispose of petitions for the annulment of investigative action. Further, in the Co-Lawyers' view, it is logical that an investigating judge be barred from adjudging the lawfulness of his or her own rulings.<sup>42</sup> Therefore, as he had identified arguments on procedural defect and prejudice in each of the nine requests, the International Co-Investigating Judge should have referred every one of them.<sup>43</sup>

29. By way of alternative submission, the Co-Lawyers argue that the International Co-Investigating Judge erred in law and in fact by declining to seize the Pre-Trial Chamber with three requests for annulment concerning Kang Keng, Tuek Sap and Ream. The Co-Investigating Judges, they maintain, were not duly seized<sup>44</sup> as regards these crime sites, which fall outwith the matters laid before them, as circumscribed by the Second Introductory Submission.<sup>45</sup>

30. The International Co-Prosecutor counters that the Appeal must be denied and that the International Co-Investigating Judge duly applied the standard of proof. In determining whether the Co-Lawyers for [REDACTED] had made an "arguable case", the Co-Investigating Judge, it is submitted, did not, therefore, act *ultra vires*<sup>46</sup> but in conformity with the jurisprudence of the Pre-Trial Chamber,<sup>47</sup> which had prescribed the "arguable case"

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<sup>38</sup> Appeal, paras 1, 11.

<sup>39</sup> Appeal, para. 11.

<sup>40</sup> Appeal, paras 10-31.

<sup>41</sup> Appeal, para. 24.

<sup>42</sup> Appeal, para. 30.

<sup>43</sup> Appeal, para. 52.

<sup>44</sup> Appeal, paras 53-62.

<sup>45</sup> Introductory Submission.

<sup>46</sup> Response to Appeal, paras 15 and 16.

<sup>47</sup> Response to Appeal, para. 14.



criterion.<sup>48</sup> To satisfy that criterion, the Co-Investigating Judge must not stop at a *prima facie* consideration, but analyse the merits of each request. Failure to so proceed would be an abrogation of the duty cast on the Judge by Internal Rule 76(2).<sup>49</sup> The International Co-Prosecutor further submits that it was the intention of the framers of the Internal Rules to confer a “meaningful gatekeeping function” on the Co-Investigating Judges pursuant to Internal Rule 76(2)<sup>50</sup> and to establish a screening mechanism to weed out unmeritorious applications, so as not to clog up the judicial system.<sup>51</sup> The International Co-Prosecutor takes the view that the Pre-Trial Chamber, in exercising appellate jurisdiction thereon, should not lightly interfere with the Co-Investigating Judges’ exercise of discretion.<sup>52</sup>

31. Lastly, the International Co-Prosecutor considers that inasmuch as the alternative submission goes to the merits of the requests concerning Kang Keng, Tuek Sap and Ream, the Pre-Trial Chamber would not be seised of those three requests for annulment were it to deny the first ground of appeal. With reference to his responses to other requests for annulment, the Co-Prosecutor submits that the second ground of appeal should be denied.<sup>53</sup>

## 2. Applicable law

32. Internal Rule 73(b) establishes the exclusive jurisdiction of the Pre-Trial Chamber to dispose of requests for annulment:

[T]he Chamber shall have sole jurisdiction over: [...]

b) applications to annul investigative action, as provided in Rule 76 [...].

33. Internal Rule 76(2) casts a screening role on the Co-Investigating Judges in annulment proceedings:

Where [...] the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seise the Chamber with a view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible [...].

<sup>48</sup> Response to Appeal, paras 13-17.

<sup>49</sup> Response to Appeal, para. 22.

<sup>50</sup> Response to Appeal, para. 24.

<sup>51</sup> Response to Appeal, para. 25.

<sup>52</sup> Response to Appeal, para. 27.

<sup>53</sup> Response to Appeal, paras 53-57.



34. Internal Rule 76(4) vests the Pre-Trial Chamber with jurisdiction to adjudge the admissibility of requests for annulment:

The Chamber may declare an application for annulment inadmissible where the application: does not set out sufficient reasons; relates to an order that is open to appeal; or is manifestly unfounded. [...]

35. Internal Rule 48 provides:

Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.

3. Criteria to be applied by the Co-Investigating Judges

36. The Pre-Trial Chamber recalls that Internal Rule 21(1)(a) mandates that proceedings before the ECCC shall be fair and adversarial and preserve a balance between the rights of the parties. In particular, ECCC proceedings shall guarantee the separation of prosecutorial and adjudicatory powers. It is the role of the Pre-Trial Chamber to safeguard such separation of powers and procedural fairness.

37. The exclusive jurisdiction vested in the Pre-Trial Chamber over applications to annul investigative action under Internal Rules 73(b) and 76(4) bars the inquiry incumbent on Co-Investigating Judges under Internal Rule 76(2) from exceeding the admissibility examination which the Chamber itself undertakes. The need to ensure impartiality of the preliminary judicial investigation mandates that adjudication of any defect that may void proceedings be the purview of the Pre-Trial Chamber and not of the Co-Investigating Judges, whose precise task it is to steer the investigations and see them through to completion.

38. Therefore in accordance with Internal Rule 48 and the jurisprudence of the Chamber,<sup>54</sup> the Co-Investigating Judges must consider applications to seize the Pre-Trial Chamber in two respects: first, as to whether the application identifies a procedural defect,

<sup>54</sup> Case no. 002/19-09-2007-ECCC/OCIJ (“Case no. 002”) (PTC06), Decision on NUON Chea’s appeal against order refusing request for annulment, 26 August 2008, D55/I/8 (“NUON Chea Decision”), para. 23; Case no. 002 (PTC41), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request to Seize the Pre-Trial Chamber With a View to Annulment Of All Investigations (D263/1), 25 June 2010, D263/2/6 (“IENG Thirith Decision”), para. 18; Case no. 003/07-09-2009-ECCC/OCIJ (PTC20), Decision on [REDACTED] Appeal against Co-Investigating Judge HARMON’s decision on [REDACTED] Applications to Seize the Pre-Trial Chamber with Two Applications for Annulment of Investigative Action, 23 December 2015, D134/1/10 (“Decision on Two Applications for Annulment”), para. 19.



and second, as to whether the application identifies the prejudice caused by such defect to the applicant. Whilst the criterion is established and generally accepted by the parties, the ambit of the Co-Investigating Judges' appraisal of such applications is a sticking-point. Indeed, the Internal Rules are silent as to the standard of proof for seising the Pre-Trial Chamber with an application for annulment.<sup>55</sup> Furthermore, although the Pre-Trial Chamber does not allow the Co-Investigating Judges to determine the merits of an application for annulment,<sup>56</sup> it nonetheless requires that their order be sufficiently reasoned and that it state "the reasons for seizing the Pre-Trial Chamber or for declining to do so".<sup>57</sup>

39. The Pre-Trial Chamber had occasion to introduce the "arguable case" criterion when defining the test which the Co-Investigating Judges must satisfy.<sup>58</sup> The concept, construed broadly by the International Co-Investigating Judge in the Impugned Decision,<sup>59</sup> must, at this juncture, be made plain.

40. The Pre-Trial Chamber considers that determination as to whether a case is "arguable" amounts precisely to ascertaining that the request is not "manifestly unfounded" within the meaning of Internal Rule 76(4). A request is "manifestly unfounded" only where it is particularly *evident* or *very apparent*<sup>60</sup> that it has no legal or factual foundation and hence no prospect of success. Further, the Chamber recalls that the Co-Investigating Judges must assess only whether the request *prima facie* or *on the face of it* sets forth a "reasoned argument"<sup>61</sup> which asserts procedural defect and prejudice, but most not adjudge the grounds advanced in the request for annulment.<sup>62</sup> The Co-Investigating Judges' analysis is therefore to be distinguished from that undertaken by the Pre-Trial Chamber, whose determination as to whether the reasoning of the request is "sufficient" entails a qualitative criterion.

41. Having regard to Internal Rule 76(2) construed in the light of Internal Rule 76(4), the

<sup>55</sup> Case no. 002 (CP72), Decision on IENG Sary's Appeal Against the OCIJ's Order Rejecting IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Acts Performed by or with the Assistance of Stephen HEDER & David BOYLE and IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Evidence Collected from the Documentation Center of Cambodia & Expedited Appeal Against the OCIJ Rejection of a Stay of the Proceedings, 30 November 2010, D402/1/4 ("IENG Sary Decision"), para. 19.

<sup>56</sup> IENG Thirith Decision, para. 16.

<sup>57</sup> Decision on Two Applications for Annulment, para. 18 *citing* NUON Chea Decision, para. 21.

<sup>58</sup> IENG Sary Decision, para. 19 *citing* IENG Thirith Decision, para. 17.

<sup>59</sup> Impugned Decision, para. 14.

<sup>60</sup> Gérard Cornu, *Vocabulaire juridique*, Quadrige / PUF, 2007, p. 574.

<sup>61</sup> Decision on Two Applications for Annulment, para. 19 *in fine*. See also IENG Thirith Decision, para. 18.

<sup>62</sup> IENG Sary Decision, para. 18.



Chamber holds that a determination that an “arguable case” was made presupposes only that the Co-Investigating Judges satisfy themselves that: (1) the request *prima facie* sets forth a reasoned argument; and (2) the request is not manifestly unfounded.

42. Accordingly, the Chamber finds unpersuasive the International Co-Prosecutor’s interpretation of Internal Rule 76(2) in its expansion of the “screening role” of the Co-Investigating Judges to a “meaningful gatekeeping function”.<sup>63</sup> Such interpretation is *ultra* the instruments and previous decisions of the ECCC. The Pre-Trial Chamber is not a mere court of appellate jurisdiction in annulment proceedings: instead, as aforementioned, it is vested with exclusive jurisdiction to hear and determine requests for annulment.

43. The Pre-Trial Chamber is of the further opinion that the terms of the Impugned Decision may invite the inference that the International Co-Investigating Judge strayed beyond the realms of his authority by inquiring as to whether the procedural defect and ensuing prejudice were identified “with sufficient specificity so as to permit identification of the investigative acts to be annulled” and whether the submissions advanced were “logically consistent, reasoned and raise an arguable contention”.<sup>64</sup> The International Co-Investigating Judge’s interpretation of the “arguable case” requirement as entailing that he satisfy himself of the “logic” or “consistency” of submissions appears more restrictive than the criterion on which the Chamber relies, inasmuch as such interpretation could give rise to a determination as to the merits of the submissions.

44. Whilst, moreover, it rests with the applicant to state the documents for annulment, their appraisal falls within the exclusive jurisdiction of the Pre-Trial Chamber, which specifies which documents are null and void only upon making a finding of procedural defect and prejudice.<sup>65</sup>

45. For all of these reasons, the Pre-Trial Chamber takes the view that the International Co-Investigating Judge’s *modus operandi* has exceeded his screening role in annulment proceedings. The Pre-Trial Chamber will apply hereinafter the foregoing criteria to determine whether the International Co-Investigating Judge rightly declined to refer each of the seven applications concerned by the present Appeal.

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<sup>63</sup> Response to Appeal, para. 24.

<sup>64</sup> Impugned Decision, para. 14.

<sup>65</sup> Decision on Two Applications for Annulment, para. 27.



### C. Referral of the applications concerned by the Appeal

#### 1. Referral of the applications concerning Kang Keng, Tuek Sap and Ream

46. The Pre-Trial Chamber notes that the International Co-Investigating Judge acknowledged that the Co-Lawyers identified procedural defect and prejudice in respect of each one of the applications concerning Kang Keng, Tuek Sap and Ream, respectively.<sup>66</sup> The International Co-Investigating Judge further acknowledged that the Co-Lawyers made *prima facie* a logically consistent and reasoned application.<sup>67</sup> Moreover, the Chamber does not discern in the Impugned Decision or the applications anything to suggest that the three applications were *evidently* or *very apparently* unfounded in fact or in law such as to deprive them of any prospect of success. The International Co-Investigating Judge made no finding of fact to support a determination that the applications are manifestly unfounded.

47. Accordingly, the Pre-Trial Chamber holds that the International Co-Investigating Judge erred in declining to refer the applications concerning Kang Keng, Tuek Sap and Ream and in considering their merits. The Pre-Trial Chamber hereby allows the Appeal and, acting pursuant to Internal Rules 73(b) and 76(4), will determine the admissibility and the merits of the three applications for annulment.

#### 2. Referral of the Witness Interview Application

48. The Pre-Trial Chamber observes, as it did before, that the International Co-Investigating Judge acknowledged that the Co-Lawyers identified procedural defect and prejudice<sup>68</sup> and that they presented *prima facie* logically consistent and reasoned arguments.<sup>69</sup> The Pre-Trial Chamber does not discern in the International Co-Investigating Judge's findings or in the application for annulment any suggestion that the application was *evidently* or *apparently* so unfounded in fact or in law as to have no prospect of success.

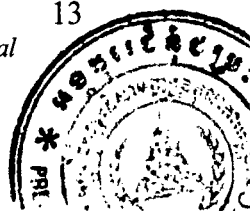
49. Accordingly, the Pre-Trial Chamber holds that the International Co-Investigating Judge erred in declining to refer the Witness Interview Application. The Pre-Trial Chamber hereby allows the Appeal and, acting pursuant to Internal Rules 73(b) and 76(4), will

<sup>66</sup> Impugned Decision, paras 23, 24, 29, 30, 43, 44.

<sup>67</sup> Impugned Decision, paras 25, 32, 46.

<sup>68</sup> Impugned Decision, paras 35, 36.

<sup>69</sup> Impugned Decision, para. 37.



determine the admissibility and merits of the application.

### 3. Referral of the Witness ██████ Application

50. The Pre-Trial Chamber has not assembled an affirmative vote of at least four judges to determine if the International Co-Investigating Judge rightly declined to refer the Witness ██████ Application Application. Pursuant to Rule 77(14) of the Internal Rules, the opinions of its various members on the admissibility and, where applicable, on the merits of the Witness ██████ Application Application are attached hereafter.

### 4. Referral of the Forced Marriage Application

51. The Pre-Trial Chamber notes that the International Co-Investigating Judge acknowledged that the Co-Lawyers identified procedural defect and prejudice<sup>70</sup> but determined that there was no “arguable contention” to sustain their allegations.<sup>71</sup> In support of that determination, the International Co-Investigating Judge makes no finding to the effect that the application is manifestly unfounded. A *prima facie* consideration of the allegations of procedural defect – whose purport is that the Introductory Submission and Supplementary Submission do not state that ██████ may have committed forced marriage as a crime against humanity<sup>72</sup> – does not permit a determination that the application is *evidently* unfounded in fact or in law and without prospect of success. The International Co-Investigating Judge therefore acted *ultra vires* in proceeding to determine the ambit of the matter which the Introductory Submission and Supplementary Submission laid before him and the merits of the Co-Lawyers’ submissions on the crime of forced marriage.<sup>73</sup>

52. Accordingly, the Pre-Trial Chamber holds that the International Co-Investigating Judge should have referred the Forced Marriage Application and erred in declining to do so, thus warranting the Chamber’s intervention. The Pre-Trial Chamber hereby allows the Appeal and, acting pursuant to Internal Rules 73(b) and 76(4), will determine the admissibility and merits of the application.

<sup>70</sup> Impugned Decision, paras 60-61.

<sup>71</sup> Impugned Decision, para. 62.

<sup>72</sup> Forced Marriage Application, para. 24.

<sup>73</sup> Impugned Decision, paras 63-65.



### 5. Referral of the D54/81 Application

53. The Pre-Trial Chamber notes in respect of the D54/81 Application that whereas the International Co-Investigating Judge acknowledged that the Co-Lawyers identified procedural defect and prejudice,<sup>74</sup> he found that no “arguable contention” had been made to sustain the prejudice.<sup>75</sup> Moreover, the International Co-Investigating Judge termed the alleged procedural defect a “minor typographical error”<sup>76</sup> and held that no prejudice to [REDACTED] or infringement of his rights could arise from a referencing error in documents shown to a witness.<sup>77</sup> The Pre-Trial Chamber takes the view that an application for annulment which relies on a minor typographical error may, even though the Impugned Decision does not use that term, be manifestly unfounded in that it is *apparent* that the application had no prospect of success.

54. Accordingly, whereas the Pre-Trial Chamber is not satisfied that the International Co-Investigating Judge was right in entertaining the merits of the application and finding it moot on account of the correction of the typographical error,<sup>78</sup> it is of the view that the International Co-Investigating Judge correctly declined to refer the D54/81 Application.

### III – ADMISSIBILITY OF THE APPLICATIONS FOR ANNULMENT

55. The Pre-Trial Chamber turns now to the admissibility of the seven applications for annulment laid before it by virtue of the Impugned Decision and the Appeal. Internal Rule 76(4) vests the Pre-Trial Chamber with jurisdiction to determine the admissibility of an application for annulment, which it may declare inadmissible where the application relates to an order that is open to appeal; is manifestly unfounded; or does not set out sufficient reasons.

56. The Pre-Trial Chamber would first note that the seven applications for annulment do not concern an order or decision from which appeal lies within the meaning of Internal Rule 74(3). They each seek the annulment of *investigative action*, which, in the view of the

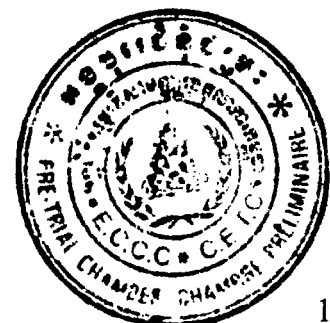
<sup>74</sup> Impugned Decision, paras 69-70.

<sup>75</sup> Impugned Decision, para. 70.

<sup>76</sup> Impugned Decision, para. 71.

<sup>77</sup> Impugned Decision, para. 70.

<sup>78</sup> Impugned Decision, para. 71 and disposition.





Co-Lawyers, was undertaken *ultra vires* by the Co-Investigating Judges,<sup>79</sup> founded on a misconstruction of the law<sup>80</sup> or fraught with irregularity.<sup>81</sup>

57. The Pre-Trial Chamber has previously determined that the five applications which form the subject-matter of the Appeal and which the International Co-Investigating Judge wrongly declined to refer, namely the Witness Interview, Forced Marriage, Kang Keng, Tuek Sap and Ream Applications, were not manifestly unfounded.<sup>82</sup> By the same token, the Pre-Trial Chamber determines that the two applications which the Impugned Decision lays before it for consideration, namely the Kratie and Grave Breaches of the Geneva Conventions Applications, are not *evidently* or *very apparently* unfounded in fact or in law as to have no prospect of success. In this respect, the Pre-Trial Chamber notes that the International Co-Investigating Judge ruled that the submissions raised in support of the applications are logically consistent<sup>83</sup> and present an “arguable contention”;<sup>84</sup> he made no determination to the effect that they are manifestly unfounded.

58. As to whether the seven applications for annulment raise *sufficient reasons*, the Chamber has found that the five applications concerned by the Appeal were, *prima facie*, reasoned.<sup>85</sup> It is of the further view that the reasoning set forth in the five applications is *sufficient* for them to be found admissible under Internal Rule 76(4). The Chamber notes that in each application the Co-Lawyers propound logically consistent submissions, underpinned by legal reasoning whose grounds are set forth or by factual material pinpointed in the case file. The Pre-Trial Chamber undertook the same analysis of the applications referred by the International Co-Investigating Judge concerning Kratie and the grave breaches of the Geneva Conventions, and likewise found that they are substantiated by legal and factual submissions which draw on material identified in the case file and that they advance sufficient reasoning as to be found admissible.

59. Having regard to the foregoing, the Pre-Trial Chamber finds the seven applications for annulment admissible under Internal Rule 76(4) and now turns to the merits of the grounds

<sup>79</sup> See Kratie Application; Kang Keng Application; Tuek Sap Application; Ream Application; Forced Marriage Application.

<sup>80</sup> See Grave Breaches Application.

<sup>81</sup> See Witness Interview Application.

<sup>82</sup> See *supra* paras 46, 48, 51.

<sup>83</sup> Impugned Decision, para. 19.

<sup>84</sup> Impugned Decision, paras 19, 57.

<sup>85</sup> See *supra* paras 46, 48, 51.



advanced by the Co-Lawyers.

#### IV – CONSIDERATION OF THE GROUNDS FOR ANNULMENT

##### A. Grave Breaches of the Geneva Conventions Application

###### 1. Submissions of the parties

60. The Co-Lawyers submit in their initial application on graves breaches of the Geneva Conventions (“grave breaches”) that the charges pertaining to said breaches must be partially annulled inasmuch as the International Co-Investigating Judge misapplied the applicable law, since the elements of the crime have not been satisfied. They submit that the groups at issue are not *protected persons* within the meaning of the Third and Fourth Geneva Conventions, as the Elements of Crimes mandate.<sup>86</sup>

61. The Notification of the Charges<sup>87</sup> issued by the International Co-Investigating Judge does not specify who is a “protected person”, but states only that the “enemies or traitors” were purged.<sup>88</sup> Such persons may, in the view of the Co-Lawyers, therefore include: (i) Cambodian military; (ii) Cambodian civilians; (iii) Vietnamese and Thai civilians; (iv) other military foreigners at sea or on islands over which the DK claimed sovereignty; and (v) other civilian foreigners at sea or on islands over which the DK claimed sovereignty. The Co-Lawyers accept that the third category alone may enjoy “protected person” status within the meaning of Article 4 of the Fourth Geneva Convention,<sup>89</sup> whereas the remaining four categories do not, save in specific, unlikely circumstances.<sup>90</sup>

62. In his Response, the International Co-Prosecutor moves the Pre-Trial Chamber to dismiss the application for annulment on the ground that it became moot on account of the International Co-Investigating Judge’s amendment of the charges.<sup>91</sup>

63. The Co-Lawyers are also of the view that the application has become moot.<sup>92</sup>

<sup>86</sup> Grave Breaches Application, para. 16.

<sup>87</sup> Notification of Charges against ██████████, 3 March 2015, D128.1, paras 9-10.

<sup>88</sup> Grave Breaches Application, paras 18-19.

<sup>89</sup> Grave Breaches Application, para. 20.

<sup>90</sup> Grave Breaches Application, para. 21 *et seq.*

<sup>91</sup> Response to Grave Breaches of the Geneva Conventions Application, paras 8-9.

<sup>92</sup> Reply on Grave Breaches of the Geneva Conventions.



## 2. The Pre-Trial Chamber's consideration of the merits

64. The International Co-Investigating Judge rescinded all charges of grave breaches of the Geneva Conventions *save* for those perpetrated against Thai and Vietnamese nationals.<sup>93</sup> The application for annulment did not encompass the charges of grave breaches committed against the Vietnamese and Thai who, where an international armed conflict between Cambodia and said States is established, are *protected persons* within the meaning of Article 4 of the Fourth Geneva Convention,<sup>94</sup> but only the remaining four categories set forth.<sup>95</sup> In the light of the International Co-Investigating Judge's rescindment of certain charges directly connected to the present application,<sup>96</sup> the Pre-Trial Chamber dismisses the application concerning grave breaches of the Geneva Conventions as it is now moot.

### **B. Kratie, Kang Keng, Tuek Sap, Ream, Forced Marriage and Witness Interview Applications**

65. After deliberation, the Judges of the Pre-Trial Chamber have not attained the required majority to reach a decision on the merits of the Appeal regarding the Kratie, Kang Keng, Tuek Sap, Ream, Forced Marriage and Witness Interview Applications.

66. Consequently, the dissenting opinions of the various members of the Pre-Trial Chamber on the merits of the applications are attached hereafter, pursuant to Internal Rule 77(14).

## **V – DISPOSITION**

### **FOR THESE REASONS, THE PRE-TRIAL CHAMBER UNANIMOUSLY:**

- **FINDS** that the International Co-Investigating Judge should have referred the Kang Keng, Tuek Sap, Ream, Forced Marriage and Witness Interview Applications;
- **FINDS** admissible the Grave Breaches, Kratie, Kang Keng, Tuek Sap,

<sup>93</sup> Written Record of Initial Appearance, 14 December 2015, D174, pp. 7-8 and 10.

<sup>94</sup> Grave Breaches Application, para. 20.

<sup>95</sup> Grave Breaches Application, paras 19-20 (namely: (i) Cambodian military; (ii) Cambodian civilians; (iii) other military foreigners at sea or on islands over which the DK claimed sovereignty; and (iv) other civilian foreigners at sea or on islands over which the DK claimed sovereignty).

<sup>96</sup> Written Record of Initial Appearance, 14 December 2015, D174, p. 10.



Ream, Forced Marriage and Witness Interview Applications;

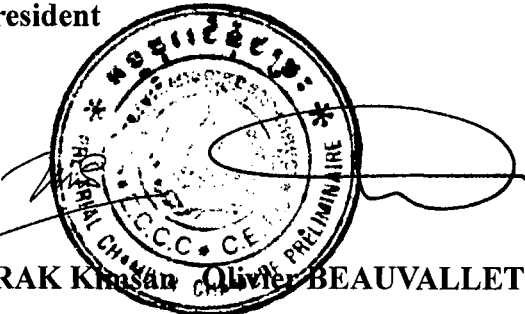




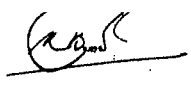
- **DENIES** the Grave Breaches Application;
- **FINDS** that the International Co-Investigating Judge rightly declined to refer the D54/81 Application;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges to decide if the International Co-Investigating Judge rightly declined to refer the Witness [REDACTED] Application Application;
- **DECLARES** that it has not assembled an affirmative vote of at least four judges to reach a decision on the merits of the Kratie, Kang Keng, Tuek Sap, Ream, Forced Marriage and Witness Interview Applications.

In accordance with Internal Rule 77(13), the present decision is not subject to appeal. The Pre-Trial Chamber having not been in a position to attain the requisite majority to reach a decision on seven of the nine applications, the investigative action whose annulment was sought shall stand.

Phnom Penh, 13 September 2016

President

Pre-Trial Chamber

PRAK Kimsan, Olivier BEAUVALLET, NEY Thol, Kang Jin BAIK, HUOT Vuthy

Judges PRAK Kimsan, NEY Thol and HUOT Vuthy append their opinion.

Judges Olivier BEAUVALLET and Kang Jin BAIK append their opinion.

**OPINIONS OF JUDGE PRAK KIMSAN, JUDGE NEY THOL, AND JUDGE HUOT VUTHY REGARDING ██████████'S NINE APPLICATIONS FOR ANNULMENT**

**A. Publication of Considerations**

67. The National Judges of the Pre-Trial Chamber (PTC) of the Extraordinary Chambers in the Courts of Cambodia (ECCC) are presenting their opinions with regard to Mr ██████████ Appeals. We, to begin with, wish to clarify our views on the publication of the PTC's considerations.

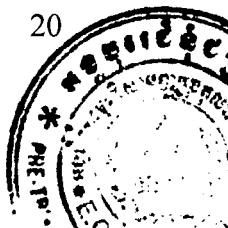
68. Pursuant to Article 3.12 of the ECCC Practice Direction authorises ██████████ to request the PTC to reclassify "Confidential" or "Strictly Confidential" documents as "Public" documents in accordance with the provisions of the Practice Direction on the Classification and Management of Case-related Information.

69. The second paragraph of Article 3.12 of the ECCC Practice Direction states, "Until the issuance of a Closing Order and the determination of any appeal against the Closing Order, the Co-Investigating Judges (CIJs) and the PTC, as appropriate, shall consider whether the proposed classification is appropriate and, if not, determine what the appropriate classification is."

70. For the foregoing reasons, the National Judges are of the view that it is not yet necessary to reclassify documents from "Confidential" to "Public" at the moment, and that ██████████ rights and interest are not affected because even though they are "Confidential documents" he has access to them. In this regard, the PTC should consider reclassification until the issuance of a Closing Order and the determination of any appeal against the Closing Order, pursuant to the second paragraph of Article 3.12 of the ECCC Practice Direction.

**B. Admissibility of Appeals on Request for Annulment of Witness ██████████, Documents Relevant to Witnesses D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15 and Forced Marriage**

**B.1. Argument of the Party**



## 1. Application for Annulment of Witness [REDACTED]

71. The Defence for [REDACTED] submits that Mr Kuehnel did not indicate in the Written Record of Investigative Action that he or any member of his investigative team met with the Witness on 13 October 2014.<sup>97</sup> The OCIJ has continually and unabatedly violated Mr [REDACTED] rights through its ongoing practice of conducting unrecorded first interviews before meeting with witnesses again to take recorded statements.<sup>98</sup> In instructing or tolerating Mr Kuehnel's reference in the 14 October 2014 Written Record of Interview to reading the previous day's written record to the Witness, without reproducing the content of that written record, International Co-Investigating Judge Harmon deliberately attempts to prevent Mr [REDACTED] from challenging the source of the Witness's evidence.<sup>99</sup>

72. The Defence for [REDACTED] submits that without recordings – audio or video, and written – of *all* conversations and interactions with Witness [REDACTED], Mr [REDACTED] cannot know the complete context and content of the interviews and cannot determine the degree to which Mr Kuehnel assisted with, impacted, or influenced the Witness's memories during the unrecorded interview on 13 October 2014, and whether and how this prior interview affected her statements on 14 October 2014.<sup>100</sup> Without a written record and/or an audio or video recording of the 13 October 2014 interview, there is no record of the questions Mr Kuehnel asked the Witness; the form or manner in which those questions were asked; the responses or other information the Witness provided; or the impact any questions or statements by Mr Kuehnel may have had upon the Witness and her reported memories.<sup>101</sup> Without such a record, the Defence cannot adequately prepare a defence against her statements or prepare to examine her at trial.<sup>102</sup> The lack of this written record infringes upon Mr [REDACTED] ICCPR-protected rights to prepare a defence, defend himself, and examine the evidence against him.<sup>103</sup>

73. The Defence for [REDACTED] submits that the Co-Investigating Judges' memorandum to the investigators regarding witness interviews instructs that OCIJ [Investigators] will "be

<sup>97</sup> [REDACTED] Application [to Seize the Pre-Trial Chamber with a Request] for Annulment of [All Investigative Action] Written Record of Interview of Witness [REDACTED] ([REDACTED] Application), para. 3, D144.

<sup>98</sup> [REDACTED] Application, para. 9,

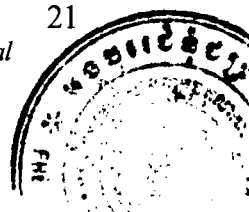
<sup>99</sup> *Ibid.*, para. 14.

<sup>100</sup> *Ibid.*, para. 17.

<sup>101</sup> *Ibid.*, para. 19.

<sup>102</sup> *Ibid.*, para. 21.

<sup>103</sup> *Ibid.*, para. 33.



able to continue to record interviews [pursuant to Rule 25(4)], in particular where the witness or civil party is a[n]: ...Elderly person.” Witness ██████████. The written record of her 13 October 2014 interview should have been placed on the Case File, and she should have been recorded by audio or video means.<sup>104</sup> The Defence indeed may have the opportunity to cross-examine this Witness during trial. However, the discovery at trial of a prior unrecorded interview has little practical effect. The Trial Chamber to date has refused to act on this issue, believing it to be a problem to be addressed by the Pre-Trial Chamber at the pre-trial stage. The OCIJ, therefore, must seize the Pre-Trial Chamber with this request.<sup>105</sup> This procedural defect can be remedied only by annulling all investigative action conducted in relation to this Witness, including removing her Written Record of Interview (D114/13) from the Case File and striking the reference to her 14 October 2014 interview from the Written Record of Investigative Action (D114/22).<sup>106</sup>

74. The International Co-Prosecutor (ICP) submits that Rule 74(3) does not permit a Charged Person to appeal decisions regarding the OCIJ’s discretionary decisions on investigative modalities. ██████████ appeal is premised on the claim that it is a violation of his rights not to have all [O]CIJ interactions with witnesses audio or video recorded; ██████████ is seeking to have the PTC rule on an issue which is left to the Co-Investigating Judges’ discretion and which is not subject to appeal by the Charged Person.<sup>107</sup>

75. The ICP submits that ██████████ failed to identify a procedural defect [and] since the ██████████ Request is entirely premised on an assumption now shown to be erroneous, the ██████████ Request is moot. ██████████ fails to cite to any legal support stating that it is violative of his rights not to access to audio or video recordings of all witness interviews or interactions by the OCIJ. Recordings that are not on the Case File are not evidence that can be used against ██████████, and the lack of the recordings in no way interfere[s] with his rights to prepare a defence.<sup>108</sup>

76. The ICP submits that ██████████ fails to demonstrate prejudice or any harm, and annulment is not the proper remedy. Should ██████████ desire further information

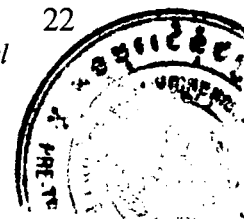
<sup>104</sup> *Ibid.*, para. 29.

<sup>105</sup> *Ibid.*, para. 32.

<sup>106</sup> *Ibid.*, para. 33.

<sup>107</sup> International Co-Prosecutor’s Response on the Merits of ██████████ Request to Annul All Investigative Action conducted in relation to Witness ██████████ (██████████ Response), para. 10, D165/2/11.

<sup>108</sup> ██████████ Response, paras. 14 to 15.



regarding the knowledge of [REDACTED], he can simply file a reasoned investigative request in order to obtain it, a request that, if rejected, he may appeal to this Chamber.<sup>109</sup>

**2. Application for Annulment of Witness Interviews D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15**

77. The Defence for [REDACTED] submits that on 20 July 2010, an OCIJ investigator interviewed Witness [REDACTED] and recorded it (D2/3) in which he stated, “Yesterday...” However, there is no audio or video recording of a 19 July 2010 interview.<sup>110</sup> Likewise, Witness [REDACTED] (D2/4) had been interviewed once before the written record of interview on 28 July 2010. After then, Mr Kuehnel filed a Site Identification Report regarding the Wat Indra Nhean (វត្តឥន្ទ្រវរ្ម័ន) site visit, with findings based on the observation by two OCIJ witnesses, and the findings of the OCIJ investigator. This report refers to the 27 July 2010 visit but not to any audio or video recording of the visit. On 23 September 2010, Mr Stocchi interviewed Witness [REDACTED] (D2/11), stating that the witness agreed to travel with him to the site where prisoners were taken to grow corn and potato... There is no audio or video recording of this trip. On 10 November 2010, Mr Kuehnel interviewed Witness [REDACTED] (D2/15). During this interview, the investigator stated that yesterday on 9 November 2010 the witness joined him to do a number of sites identifications, but there is no indication that this visit was audio or video recorded. Witness [REDACTED] was interviewed about the removal of East Zone troops to do rice farming and the location of the Durian Plantation (D2/16), but there is no Site Identification Report regarding a visit to the Durian Plantation with this Witness. On 6 March 2012, Mr Kuehnel interviewed Witness [REDACTED]; and the written record of interview (D32/2) states, “What you listened, it is correct? The same as the word/story that you told yesterday?”, but there is no audio or video recording of a 5 March 2012 interview. On 8 March 2012 and 9 March 2012, Mr Kuehnel interviewed Witness [REDACTED]

<sup>109</sup> *Ibid.*, para. 21.

<sup>110</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Conducted in Relation to Witness Interviews (Application) D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15, para. 3, D140.





██████████ (D32/4) with an audio recording, but the recording does not include the entire interview held on 8 March 2012. On 1 May 2012, Witness ██████████ (D32/13) was interviewed and the written record of interview does not reflect a prior unrecorded interview, nor is there any audio or video recording. On 2 May 2012, Witness ██████████ (D32/14) discussed the conflict with Vietnam, and East Zone attacks against Vietnam. On 3 May 2012, Witness ██████████ was interviewed a third time (D32/15); and two of the marked locations, Road 22 (now Road 72) and the location of Division 3 in Svay Rieng, are not mentioned in any of the written records of interview.<sup>111</sup>

78. The Defence submits that ICCPR guarantees ██████████ the rights to adequate facilities to prepare a defence, to defend himself in person or through counsel, and to examine the evidence against him. These rights are guaranteed to ██████████ at all stages of the ECCC proceedings.<sup>112</sup> However, the methods used by the investigator in interviewing the above-referenced Witnesses violated ██████████ rights of defence. Without recordings of all conversation and interaction with these Witnesses, ██████████ cannot know the complete context and content of the interviews. More importantly, ██████████ cannot determine the degree to which the investigator assisted with or impacted the Witnesses' memories of events during the unrecorded interviews. The ability to assess all factors that may impact the Witnesses' credibility is crucial to the preparation of ██████████ defence.<sup>113</sup> The Defence cannot adequately determine whether the Witnesses' memories are indeed their own or whether they were impacted by external influences. The lack of such recordings infringes upon ICCPR-protected rights. These are procedural defects that can be remedied only by annulling all investigative acts conducted in relation to these interviews and removing these interviews and any accompanying audio recordings from the Case File.<sup>114</sup>

79. The Defence for ██████████ asserts that there are procedural defects violating ██████████ ICCPR-recognized rights to adequate facilities to prepare a defence,... ██████████ has an interest in knowing the full extent of the interactions between the investigators and the witnesses. This harm to ██████████ interests causes him prejudice in the exercise

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<sup>111</sup> Application, Para. 5.

<sup>112</sup> Application, Para. 9.

<sup>113</sup> Application, Para. 10.

<sup>114</sup> Application, Para. 14.



of his fair trial rights.<sup>115</sup>

80. The ICP recognizes that appeals from rejections of annulment requests are as of right under IR 74(3). However, this Rule does not permit a Charged Person to appeal decisions regarding the CIJs' discretionary decisions on investigative modalities.<sup>116</sup> [REDACTED] has requested for recordings of all conversations and interactions with these Witnesses, affirming that the lack of audio recordings infringes upon his ICCPR-protected rights. However, the CIJ has held that "pursuant to IR 25, and as confirmed by the Trial Chamber in Case 002 it is not mandatory to audio or video record interviews of witnesses or civil parties." The CIJ has issued instructions as to how recordings should be carried out by his investigators.<sup>117</sup>

81. The Co-Prosecutor asserts that pursuant to IR 48, as the PTC stated a procedural irregularity which is not prejudicial to the applicant does not entail annulment. [REDACTED] has failed to identify a procedural defect meriting annulment in the Witness Interview Request. [REDACTED] request for annulment of all Written Records of Interview is based on an argument that it was improper for the investigators to have discussions with witnesses without audio or video recording those interactions. The CIJ explained in his Annulment Decision why the lack of a recording of an interaction with a Witness by an OCIJ investigator does not constitute a procedural defect, and the Co-Prosecutor adopts those arguments. As explained in the Annulment Decision: "such records are not mandatory under the IRs and their absence does not undermine the general presumption of reliability which the PTC and the Trial Chamber have stated attach to WRIs"; and "the CIJs are not under any obligation to audio or video record every witness interview. The decision whether to audio record witness or Civil Party interviews is left to the discretion of the CIJs."<sup>118</sup> [REDACTED] does not present any legal authority for the proposition that no audio or video recording interview would be a violation of a fundamental right.<sup>119</sup>

82. The ICP asserts that [REDACTED] fails to demonstrate prejudice. [REDACTED]

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<sup>115</sup> [REDACTED] Consolidated Reply to International Co-Prosecutor's Response on the Merits of [REDACTED] Request to Annul All Investigative Action Conducted in relation to Witness [REDACTED] and Witness Interview Application, para. 16, D165/2/21.

<sup>116</sup> International Co-Prosecutor's Response on the Merits to [REDACTED] Request to Annul All Investigative Action Conducted in relation to Witness Interviews (Response) D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15, para. 10, D165/2/12.

<sup>117</sup> Response, para. 12.

<sup>118</sup> Response, para. 15.

<sup>119</sup> Response, para. 17.



claims of harm consist entirely of speculation, stating: “unrecorded interview may have impacted the Witnesses’ memories subsequent statements, and subsequent testimony at trial.”<sup>120</sup>

83. The ICP asserts that annulment is not the proper remedy. IR 48 only permits annulment as a remedy, rather than mandating it.<sup>121</sup> As an option, should [REDACTED] desire further information regarding the knowledge of any of the relevant witnesses, he can simply file a reasoned investigative request in order to obtain it, a request that if rejected he is entitled to appeal to this Chamber.<sup>122</sup>

### 3. Application for Annulment of Forced Marriage

84. The Defence for [REDACTED] submits that by investigating allegations of forced marriage that do not amount to crimes against humanity (given the facts underlying the *chapeau* element of the Attack as defined in the Introductory Submission (IS) and the lack of a nexus to an armed conflict, the former CIJ Harmon erred as a matter of law and fact. The investigation into forced marriage must be annulled.<sup>123</sup>

85. The Defence asserts that the ICP has not set forth facts in his Introductory or Supplementary Submission that indicate that Mr [REDACTED] may have committed the crime against humanity of forced marriage as another inhumane act. For an act of forced marriage to constitute the crime against humanity of another inhumane act at the ECCC, it must have been committed as part of a widespread and systematic attack directed against a civilian population on national, political, ethical, racial or religious grounds. The act also must have a nexus with an armed conflict.<sup>124</sup>

86. The Defence submits that the attack is defined as consisting of repeated purges in which people were removed from positions of authority and killed... Furthermore, the OCIJ cannot investigate attack-related facts other than those set forth in the IS. The Supplementary Submission (SS) contains no facts indicating that the alleged acts of forced marriage were

<sup>120</sup> Response, para. 19.

<sup>121</sup> Response, para. 20.

<sup>122</sup> Response, para. 24.

<sup>123</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Conducted in relation to Forced Marriage (Forced Marriage Application), para. 12, D151.

<sup>124</sup> Forced Marriage Application, para. 24.



committed as part of the attack and had any nexus with an armed conflict.<sup>125</sup> The OCIJ is investigating facts that do not constitute a crime within the ECCC's jurisdiction; and to remedy this defect, all investigative acts conducted in relation to forced marriage must be annulled.<sup>126</sup>

87. The Defence argues that the Co-Prosecutor's assertion that an investigation conducted on the basis of facts alleged in a SS in compliance with the Rules does not interfere with Mr ██████████ right to a fair hearing as the SS contains no facts indicating that the alleged acts of forced marriage were committed as part of a widespread or systematic attack directed against a civilian population on national, political, ethnical, racial, or religious grounds (the "Attack"), or that the alleged acts had any nexus with an armed conflict.<sup>127</sup>

88. The ICP asserts that in the Forced Marriage Request, ██████████ fails to carry his burden to show a procedural defect or any prejudice, and that annulment is not the proper remedy.<sup>128</sup>

89. The ICP submits that the obligations of the Co-Prosecutor in the IS and SS as laid out in IR 53 are to provide a summary of the facts and the type of offence(s) alleged, obligations with which the Co-Prosecutor fully complied in regards to forced marriage.<sup>129</sup>

90. The Co-Prosecutor notes that ██████████ attempts to define what that attack was by arbitrary selecting a single paragraph out of the Second Introductory Submission (SIS)–paragraph 11–and claiming that it represents the entirety of the Co-Prosecutor's theory of the parameters of the widespread or systematic attack that took place.<sup>130</sup> It is worth noting that paragraph 10 of the SIS would encompass forced marriage. It begins between 17 April 1975 and 6 January 1979, the Communist Party of Kampuchea (CPK) set out to fundamentally alter Cambodian society on ideological lines through forcible economic and social change. To accomplish this change, the leaders of the CPK implemented policies that resulted in widespread starvation, systematic brutality, inhumane living conditions and the deaths of

<sup>125</sup> Forced Marriage Application, paras 26 to 30.e

<sup>126</sup> Forced Marriage Application, para. 38.

<sup>127</sup> ██████████ Reply to International Co-Prosecutor's Response on the Merits of ██████████ Request to Annul All Investigative Action Conducted in relation to Forced Marriage, para. 13, D165/2/24.

<sup>128</sup> International Co-Prosecutor's Response to the Merits of ██████████ Request to Annul All Investigative Action Conducted in relation to Forced Marriage (Response to Forced Marriage) D165/2/10.

<sup>129</sup> Response to Forced Marriage, para. 20.

<sup>130</sup> Response to Forced Marriage, para. 24.



between 1.7 and 2.2 million people. However, ██████████ prefers to discount this paragraph as only providing an overview of the DK period, even though it is in the exact same section and directly preceding the paragraph ██████████ claims defines the attack.<sup>131</sup>

91. The Co-Prosecutor further asserts that ██████████ is being investigated on the basis of facts alleged in a SS in no way interferes with his right to a fair hearing as he has already raised.<sup>132</sup> ██████████ makes no showing that investigating facts regarding forced marriage will substantially delay the investigation, and indeed it likely will not given that witnesses are usually questioned on a number of matters only one of which, if at all, is forced marriage; and in the Forced Marriage Request ██████████ is seeking the annulment of investigative acts that have already taken place would not shorten the investigation at this point.<sup>133</sup>

92. The Co-Prosecutor states annulment would be a drastic and disproportionate remedy for any harm proved. The ECCC was established to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the serious crimes committed during that period. This mandate imposes on this Tribunal a tremendously heavy burden which it needs to carry in an efficient and successful manner. In the light of this responsibility under the Statute towards the [Cambodian and] international community and considering the seriousness of the crimes that this Tribunal is entrusted to adjudicate, it would be utterly inappropriate to exclude relevant evidence due to procedural considerations, as long as the fairness of the trial is guaranteed.<sup>134</sup>

## B. 2. Law

93. IR 76(2) states that, “Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the CIJs requesting them to seize the Chamber with a view to annulment. The CIJs shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order, while IR 48 states that, “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.”

<sup>131</sup> Response to Forced Marriage, para. 25.

<sup>132</sup> Response to Forced Marriage, para. 28.

<sup>133</sup> Response to Forced Marriage, para. 29.

<sup>134</sup> Response to Forced Marriage, para. 38.



94. The National PTC Judges find that the ECCC was established under the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Agreement), and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (the ECCC Law) and the IRs are applied.

95. The ECCC is a special court that applies the procedures of prosecution and judicial investigation different from the Cambodia's national courts. The prosecution and judicial investigation under the national courts merely concern facts, *i.e.* not prosecution and judicial investigation of an individual.<sup>135</sup> On the contrary, at the ECCC, prosecution and judicial investigation can proceed only where the two conditions—first, facts, “the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”, and second, individuals, “senior leaders of Democratic Kampuchea and those most responsible for the crimes”<sup>136</sup>—are met.

96. The National and International Co-Prosecutors expressed their dissenting opinions on the issuance of the IS in Case 003, in which the ICP requested to submit the SIS, while the National Co-Prosecutor (NCP) requested not to, on the grounds that “these suspects are not senior leaders and/or those most responsible”<sup>137</sup> The dissent was then appealed before the PTC. The National and International PTC Judges also expressed their dissenting opinions, in which the National PTC Judges are in favour of the NCP's arguments, while the International PTC Judges are in favour of the ICP's arguments.<sup>138</sup>

97. In light of the foregoing, the National PTC Judges are of the view that all investigative actions of ██████████, Witness Interviews D2/3, D2/4, D2/11, D2/15, D2/16, D32/2, D32/4, D32/13, D32/14 and D32/15 and forced marriage must be found to be null and void.

<sup>135</sup> Articles 44 and 125 of the Cambodian Code of Criminal Procedure.

<sup>136</sup> Article 1 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; Article 1 of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea; and Internal Rule 53.

<sup>137</sup> National Co-Prosecutor's Response to the Pre-Trial Chamber's Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor's Additional Observations, 22 May 2009, para. 86(A).

<sup>138</sup> Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy, 17 August 2009.



**C. Considerations of Appeal on Request for Annulment of Investigative Action  
concerning Ream, Teuk Sap ,Kang Keng and Kratie**

**C. 1. Arguments of the Party**

**1. Application for Annulment of Investigative Action concerning Ream**

98. The Defence submits that the investigation into alleged Ream Port/Naval Base forced labour and execution sites is procedurally defective since the IS did not seize the CIJ with investigating alleged crime sites in Ream,<sup>139</sup> despite not being properly seized, CIJ Harmon investigated alleged crime sites in Ream prior to receiving the SS<sup>140</sup> and the SS is invalid to seize the CIJs with investigating alleged crime sites in Ream.<sup>141</sup>

99. The Defence argues that related facts that are not aggravating circumstances may not be investigated without a supplementary submission; and a supplementary submission is always necessary, unless the new facts are **indivisible** from the original facts.<sup>142</sup> The references to Ream in the IS were too general to seize the CIJs of specific crime sites, other allegedly related sites were distinct and **divisible** from Ream, and CIJ Harmon investigated the area without being seized with a formal, valid SS.<sup>143</sup> Paragraphs 58 to 61 of the IS deal with Stung Hav Rock Quarry and the Democratic Kampuchea Navy. Stung Hav is roughly 40 kilometers from Ream. Stung Hav and Ream are divisible, and the IS refers to Stung Hav Rock Quarry.<sup>144</sup>

100. The Defence for [REDACTED] submits that the ICIJ undertook investigations concerning Ream prior to receiving the SS. For example, the following witnesses were asked: Witness [REDACTED] (on 15 August 2014); Witness [REDACTED] (on 20 August 2014 and 10 September 2014); and Witness [REDACTED] (on 11

<sup>139</sup> [REDACTED]'s Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action Concerning Ream (Ream Application), D141, III.1.

<sup>140</sup> Ream Application, II.

<sup>141</sup> Ream Application, III.

<sup>142</sup> Ream Application, para. 10.

<sup>143</sup> [REDACTED]'s Appeal against International Co-Investigating Judge's Decision on [REDACTED]'s Nine Applications to Seize the Pre-Trial Chamber with Requests for Annulment Pursuant to Internal Rule 76(2) ("Appeal"), para. 41, D165/2/3.

<sup>144</sup> Ream Application, para. 16.



September 2014).<sup>145</sup>

101. The Defence for ██████████ states that the fact that Co-Prosecutor Koumjian issued the SS after investigation into Ream occurred does not cure the procedural defect that occurred from CIJ Harmon investigating without being properly seized.<sup>146</sup> This procedural defect violates the separation of powers necessary for the proceedings to be fair.<sup>147</sup>

102. The Co-Prosecutor responded to the Defence that there was no procedural defect in the investigation into Ream as Ream fell within the scope of the judicial investigation,<sup>148</sup> and the ICIJ undertook no coercive acts before the SS.<sup>149</sup> ██████████ has suffered no prejudice; any error was harmless, and the annulment of investigation into Ream would not be a proper remedy.<sup>150</sup>

103. The ICP clarifies that the Ream Sites fell squarely within the area of responsibility of Division 164 and ██████████. Indeed, Ream naval port's significance, as the most important Division 164 naval dock under the direct authority of Regiment 149, is clear from its inclusion in paragraphs 82 and 86(a) of the IS. The Ream Sites are *very* geographically proximate to other sites run by Division 164, including the Kang Keng airfield sites, Bet Trang, and Teuk Sap. Operationally, the Ream forced labour sites formed an integral component of the network of forced labour sites developed by Division 164 in the Kampong Som area that also included the Kang Keng airport sites, Bet Trang worksite and Stung Hav Rock Quarry.<sup>151</sup>

104. The ICP finds that even assuming there was a procedural error, no annulment is merited because any error was harmless. IR 48 states: "Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application." ██████████ has not demonstrated any infringement of his rights by the

<sup>145</sup> Ream Application, para. 19.

<sup>146</sup> Ream Application, para. 22.

<sup>147</sup> Ream Application, para. 30.

<sup>148</sup> International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action concerning Ream (Ream Response), D165/2/14, IV. 1 and 2.

<sup>149</sup> Ream Response, iii.

<sup>150</sup> Ream Response, paras 30 to 33.

<sup>151</sup> Ream Response, para. 17.





errors he alleges.<sup>152</sup>

105. The Co-Prosecutor asserts that the investigation extends to all facts referred to in this SIS provided those facts assist in investigating: (1) the jurisdictional elements necessary to establish whether the factual situations specified in paragraphs 43 to 66 constitute crimes within the jurisdiction of the ECCC; or (2) the mode of liability of the Suspects named in this Submission.<sup>153</sup> The Co-Prosecutor also asserts that the SIS sets out the importance of Ream in paragraphs 82 and 86(a).<sup>154</sup>

## 2. Application for Annulment of Investigative Action concerning Teuk Sap

106. The Defence for ██████████ submits that the IS makes no mention of Teuk Sap, and does not allege that Division 164 had any security centre apart from Wat Indra Nhean. Paragraphs 52 to 54 of the IS<sup>155</sup> are not specific enough to seize the CIJs of investigation into specific crime sites. These paragraphs do not mention Teuk Sap or any security centres. They merely contain the “Overview of Crimes” alleged concerning Division 164;<sup>156</sup> and the CIJs in Case 002 did not investigate Chraing Chamres (ច្រាំងចម្រុះ) and Boeng Trabek (បឹងត្របែក) on the grounds that these two sites were listed in the Case 002 IS, but in the section referring to Mr IENG Sary’s participation and knowledge rather than in the section referring to specific crime sites. The CIJs thus found that they had not been seized of facts that would allow them to investigate these places as new crime sites. The CIJs should have similarly refused to investigate Teuk Sap until they had been properly seized with a SS.<sup>157</sup>

107. The Defence clarifies that CIJ Harmon investigated Teuk Sap prior to receiving the SS; for example, the following witnesses were asked: Witness ██████████ (on 31 July 2014); Witness ██████████ (on 8 August 2014); Witness ██████████

<sup>152</sup> Ream Response, para. 24.

<sup>153</sup> Co-Prosecutors’ Second Introductory Submission regarding the Revolutionary Army of Kampuchea, 20 November 2008 (Second Introductory Submission), para. 42.

<sup>154</sup> International Co-Prosecutor’s Supplementary Submission regarding Crime Sites related to Case 003, 31 October 2014 (Supplementary Submission), para. 15, D120.

<sup>155</sup> International Co-Prosecutor’s Response to Forwarding Order regarding Teuk Sap Prison, 20 June 2014, para. 3(a), D102/1. Supplementary Submission, para. 11.

<sup>156</sup> ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action concerning Teuk Sap (Teuk Sap Application), para. 11, D138.

<sup>157</sup> Teuk Sap Application, para. 12.



██████████ (on 21 October 2014); and Witness ██████████ (on 21 August 2014), etc.<sup>158</sup>

108. The Defence submits that the SS states that Teuk Sap may be investigated on the basis of paragraphs 42, 86(c)-(d), and 89; however, these paragraphs only permit the CIJs to investigate to determine: a. jurisdictional elements of the crimes alleged (pursuant to paragraph 42); b. modes of liability (pursuant to paragraph 42); or c. ██████████ legal and factual authority (pursuant to paragraphs 86(c)-(d) and 89).

109. The Defence also submits that the procedurally defective investigation harms ██████████ because it expands the scope of the investigation against him, leaving him with no notice of the crimes for which he is being investigated. This procedural defect violates Mr ██████████ right to be informed of the case against him and to prepare a defence.<sup>159</sup>

110. The Co-Prosecutor asserts that Teuk Sap falls within the scope of the judicial investigation, on the grounds that Teuk Sap was located in the area of responsibility of Division 164. It was geographically proximate to other sites run by Division 174, such as Bet Trang and Kang Keng Airfield, and indivisibly connected to the operations of Division 164, being one of the security centres under its control, including Wat Indra Nhean.<sup>160</sup>

111. The Co-Prosecutor asserts that Teuk Sap also falls within the purview of paragraphs 65 and 66 of the IS. These paragraphs, which fall under the heading of crimes and thus form part of the factual allegations regarding the crime base, seize the CIJs of these crime sites.<sup>161</sup>

### 3. Application for Annulment of Investigative Action concerning Kang Keng

112. The Defence submits that the reference to Kang Keng in the IS is too general; and the IS does not allege that any crimes took place in this town, but only alleges, in the section dealing with Mr ██████████ legal and factual authority that ██████████ was responsible

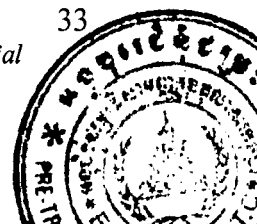
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<sup>158</sup> Teuk Sap Application, para. 21.

<sup>159</sup> Teuk Sap Application, para. 28.

<sup>160</sup> International Co-Prosecutor's Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action concerning Teuk Sap (Teuk Sap Response), para. 17, D165/2/15.

<sup>161</sup> Teuk Sap Response, para. 20.



for defending the town.<sup>162</sup> The single off-hand mention of Kang Keng in the section of the IS dealing with [REDACTED] legal and factual authority is not sufficient to seize the CIJs with these sites.<sup>163</sup>

113. The Defence submits that the fact that Co-Prosecutor Koumjian alleges that the CIJs were seized with investigating Kang Keng Sites because Co-Prosecutor Cayley's "Response" about Bet Trang dam implied that Kang Keng was considered by the ICP as being already included in the scope of the IS is inappropriate. This Response was not sufficient to seize the CIJs with investigating Bet Trang, and therefore is certainly insufficient to seize them with investigating alleged Kang Keng forced labour and reeducation sites.<sup>164</sup> This Response does not meet the formalities to be considered a SS.<sup>165</sup>

114. The Defence states that prior to receiving the SS, the CIJ undertook investigation concerning Kang Keng; for example, with International Rogatory Letter D84, issued on 12 August 2013, the following witnesses were asked: Witness [REDACTED] on 19 June 2013; Witness [REDACTED] (on 14 August 2013)... etc.<sup>166</sup>

115. The Defence further submits that the fact that the SS was issued after investigation into Kang Keng occurred and after Rogatory Letter D114 was issued does not cure the procedural defect that occurred from CIJ investigating without being properly seized.<sup>167</sup> This procedurally defective investigation harms Mr [REDACTED], violating his right to be informed of the case against him and to prepare a defence.<sup>168</sup>

116. The Co-Prosecutor submits that the Co-Prosecutor's Response to the Forwarding Order did not itself seek to seize the CIJs with Kang Keng and does not purport to be a supplementary submission. No supplementary submission is required since an investigation

<sup>162</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action concerning Alleged Kang Keng Forced Labor and Reeducation Sites (Kang Keng Application), para. 11, D139.

<sup>163</sup> Kang Keng Application, para. 12.

<sup>164</sup> Kang Keng Application, para. 16.

<sup>165</sup> Kang Keng Application, para. 17.

<sup>166</sup> Kang Keng Application, para. 19.

<sup>167</sup> Kang Keng Application, para. 22.

<sup>168</sup> Kang Keng Application, para. 26.



into Kang Keng Sites had already been authorized by the IS.<sup>169</sup>

117. The Co-Prosecutor also submits that the Kang Keng forced labour and reeducation sites were potentially relevant to, and therefore properly formed part of the investigation into, the organization and scale of the internal security mechanism of Division 164. They fall within the purview of paragraph 52 of the IS.<sup>170</sup> Even if the ICP had not mentioned Kang Keng explicitly anywhere in the IS, at paragraph 86(a) the CIJs were duly seized of and permitted to investigate the Kang Keng Sites as crimes sites.<sup>171</sup>

118. The Co-Prosecutor asserts that IR 48 states: “Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.” ██████████ has not demonstrated any infringement of his rights by the errors he alleges.<sup>172</sup> ██████████ application for annulment is not the proper remedy since IR 48 itself permits annulment as a remedy; it does not mandate it, stating that action “may” be annulled rather than that it “shall” or “must” be annulled. The PTC has adopted this permissive language, stating that where a procedural defect has harmed the interests of a Charged Person the action “may be annulled.”<sup>173</sup>

#### 4. Application for Annulment of Investigative Action concerning Kratie

119. The Defence for ██████████ asserts that the IS does not mention Kratie, Sector 505, or Division 117. It does, however, allege that there was a joint criminal enterprise (“JCE”), the purpose of which was to purge enemies and traitors from the Revolutionary Army of Kampuchea (RAK). An alleged purge of Division 117 *military* cadres could be investigated to the extent it assists in establishing elements of the alleged JCE or jurisdictional elements of the crime alleged. Purges in Kratie *may* not be investigated as distinct crimes for which ██████████ could bear criminal liability. Purges of *civilian* cadres were not mentioned in the IS, do not relate to the alleged JCE, and thus may not be investigated based on the IS unless

<sup>169</sup> International Co-Prosecutor’s Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action concerning Kang Keng Forced Labour and Reeducation Sites (Kang Keng Response), para. 19, D165/2/16.

<sup>170</sup> Kang Keng Response, para. 21.

<sup>171</sup> Kang Keng Response, para. 22.

<sup>172</sup> Kang Keng Response, para. 26.

<sup>173</sup> Kang Keng Response, para. 33.



they assist in providing the jurisdictional elements of the crimes alleged.<sup>174</sup>

120. The Defence submits that the only facts that may be investigated without a SS are aggravating circumstances relating to an existing submission.<sup>175</sup> Paragraph 43 of the IS makes no mention of Division 117 or Sector 505. It further makes no mention of purging civilians. It relates to the alleged crime site S-21. Alleged purges in Kratie are not closely linked to S-21 such that they may be considered indivisible or an aggravating circumstances. [REDACTED] involvement in alleged purges in Kratie would not increase his degree of liability for the alleged crimes that occurred at S-21.<sup>176</sup> Paragraph 62 makes no mention of purges, Kratie, Division 117, Sector 505, or [REDACTED] authority over these areas or alleged crimes. It relates to the alleged crime site "Vietnam." Alleged purges in Kratie are not closely linked to Vietnam such that they may be considered indivisible or an aggravating circumstances.<sup>177</sup>

121. The Defence submits that prior to receiving the SS on 31 October 2014, CIJ Harmon issued Rogatory Letter D114 on 2 September 2014, specifically requesting his investigators to undertake investigation concerning purges of Division 117. He also undertook investigations concerning alleged purges in Kratie prior to issuing this Rogatory Letter; for example, the following witnesses were asked: Witness [REDACTED] (on 18 October 2013); Witness [REDACTED] on 14 January 2014); Witness [REDACTED] [REDACTED] (on 13 February 2014), etc.<sup>178</sup>

122. The Defence submits that the CIJ could have investigated alleged purges in Kratie provided it would assist in investigating: (a) the jurisdictional elements necessary to establish whether the factual situations specified in paragraphs 43 to 66 of the IS constitute crimes within the jurisdiction of the ECCC; or (b) the modes of liability.<sup>179</sup>

123. The Defence concludes that CIJ Harmon's investigation and charges resulting

<sup>174</sup> [REDACTED] Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges concerning Alleged Purges in Kratie (Kratie Application), para. 13, D137.

<sup>175</sup> Kratie Application, para. 16.

<sup>176</sup> Kratie Application, para. 17.

<sup>177</sup> Kratie Application, para. 18.

<sup>178</sup> Kratie Application, para. 19.

<sup>179</sup> Kratie Application, para. 20.



therefrom are procedurally defective because he is investigating and has charged ██████████ ██████████ for alleged crimes not set out in the IS and of which he was not validly seized by the SS. This procedural defect renders the proceedings unfair.<sup>180</sup>

124. The Co-Prosecutor asserts that ██████████ Application for Annulment should be dismissed on the grounds that there was no procedural defect in Kratie investigation,<sup>181</sup> and ██████████ has suffered no harm.<sup>182</sup> ██████████ application proceeds on the basis that any fact expressly mentioned as crimes in an introductory or supplementary submission is new, unless it can be considered an aggravating circumstance. The interpretation is overly restrictive and inconsistent with ECCC jurisprudence, and Cambodian and French procedural law.<sup>183</sup>

125. The Co-Prosecutor submits that the purges of Division 117 military cadres and Sector 505 civilian cadres in Kratie are included within the scope of crimes to be investigated in Case 003 as part of the allegation in paragraph 43 of the IS regarding cadres who were purged and taken to the S-21 Security Centre. The Co-Prosecutors expressly identified evidence that “RAK personnel were sent to S-21 from all of the RAK “regular” divisions, including Division 164, Division 170, etc.” It is clear from the word “including” that the divisions named were not intended to be the exhaustive list. Division 117 is clearly included in the allegation that RAK personnel were sent to S-21 as it was, like those listed, a “regular” RAK Division under the authority of the General Staff.<sup>184</sup> It is clear that paragraph 43 of the IS incorporates by reference the facts on the earlier paragraphs regarding the “criminal plan to purge RAK divisions.”<sup>185</sup> The purges of civilian cadres in Kratie are indivisible from the facts surrounding the imprisonment and execution of prisoners at S-21 and would increase his degree of liability for the alleged crimes that occurred at S-21.<sup>186</sup>

126. The Co-Prosecutor submits that although the PTC decides that Kratie purges are “new facts”, pursuant to IR 55(3), the investigation action may not be annulled on the grounds that

<sup>180</sup> Kratie Application, para. 28.

<sup>181</sup> International Co-Prosecutor’s Response on the Merits of ██████████ Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Investigative Action and Charges concerning Purges in Kratie (Kratie Response), paras 10 to 23, D165/2/17.

<sup>182</sup> Kratie Response, paras 24 to 33.

<sup>183</sup> Kratie Response, para. 10.

<sup>184</sup> Kratie Response, para. 18.

<sup>185</sup> Kratie Response, para. 19.

<sup>186</sup> Kratie Response, para. 20.



██████████ has suffered no harm. Furthermore, by the time ██████████ had access to the case file, any error in regard to what constitutes “new facts” had been fully cured as Kratie purges had been included in a supplementary submission, paragraphs 12 to 14.<sup>187</sup> Annuling the Kratie investigation is not an appropriate remedy.<sup>188</sup>

**C. 2. Are the facts concerning Ream, Teuk Sap, Kang Keng, and Kratie open for investigation in the SIS?**

127. The National Judges will consider whether the facts concerning Ream, Teuk Sap, Kang Keng, and Kratie are the existing facts set out in the Co-Prosecutors’ SIS regarding the RAK, dated 20 November 2008, or new facts.

128. In the SIS, a request was made to open an investigation into the following facts:

- A (the S-21 Security Centre;
- B (the Stung Tauch execution site;
- C (the Kampong Chhnang airfield construction site;
- D (the Central Zone;
- E (the New North Zone;
- F (the East Zone; and
- G (Vietnam.

In addition to the above facts, the ICP also requested to open the investigation into additional facts occurred at the following locations:

- A (the S-22 Security Centre;
- B (the Wat Indra Nhean (វត្តឥន្ទ្រវរ្ម័ន) Security Centre;
- C (the Stung Hav rock quarry;

<sup>187</sup> Kratie Response, para. 26.

<sup>188</sup> Kratie Response, paras 30 to 33.



D (the DK navy;

E (various other unnamed security centres run by the Divisions of the RAK.

### **1. Application for Annulment of Investigative Action concerning Ream**

129. The PTC finds that paragraphs 82 and 86(a) of the SIS make mention of the importance of Ream, *i.e.* about [REDACTED] role and authority, but make no mention of any specific criminal fact. Those criminal facts were further identified in the SS, paragraphs 17 and 18. In other words, Ream is not seized by the SIS.

### **2. Application for Annulment of Investigative Action concerning Teuk Sap**

130. The PTC finds that paragraphs 65 and 66 make mention of other security centres and execution sites. Paragraph 65<sup>189</sup> states: "It appears that each Division operated its own security centre, in addition to sending prisoner to S-21. The security centres of Divisions 502, 164, and 801 are described in detail in paragraphs 46, 55 to 57 and 63 to 64. However, based on the evidence concerning Divisions 502, 164 and 801, as well as the existence of a network of security centres throughout the DK regime, the Co-Prosecutors believe that the other RAK divisions also operated security centres that were used to carry out the purge." Paragraphs 55 to 57 make mention of Wat Indra Nhean Security Centre whose evidence is consistent with Duch's testimony that security centres throughout DK implemented the same system of interrogation and execution as S-21. Based on paragraphs 65, and 55 to 57 of this SIS, the security centre used by Division 164 is Wat Indra Nhean Security Centre, excluding Teuk Sap.

### **3. Application for Annulment of Investigative Action concerning Kang Keng**

131. Paragraph 52 of the SIS does not cover Kang Keng; and only paragraph 86(a) referred to Kang Keng describes [REDACTED] various duties. Paragraph 42 provides that the judicial investigation is not limited to the facts specified in paragraphs 43 to 66, but extends to all facts referred to in this SIS provided those facts assist in investigating: (1) the jurisdictional elements necessary to establish whether the factual situations specified in paragraphs 43 to 66 constitute crimes within the jurisdiction of the ECCC; (2) the mode of liability of the

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<sup>189</sup> The Second Introductory Submission.





Suspects named in this Submission.<sup>190</sup> Paragraph 86(a) refers to only [REDACTED] various duties, which is part of [REDACTED] background and which is insufficient to establish a fact for achieving the two objectives of paragraph 42 of the SIS. Furthermore, the Co-Prosecutors submit that they have reason to believe that the suspect [REDACTED] committed offences described in paragraphs 43 to 66 of this SIS, which are legally characterized in paragraph 99.<sup>191</sup> Based on these abovementioned paragraphs, Kang Keng was not seized with investigation by this SIS.

#### 4. Application for Annulment of Investigative Action concerning Kratie

132. The alleged purge of Division 117 military cadres could be investigated to the extent it assists in establishing elements of the alleged JCE or jurisdictional elements of the crime alleged.<sup>192</sup> Purges in Kratie were not described in paragraph 43 as the Co-Prosecutor stated. This paragraph described other divisions, but not Divisions 117 and 505. Not until the issuance of the SS dated 31 October 2014<sup>193</sup> were Divisions 117 and 505 included in paragraph 13. It thus means that the two Divisions were not contemplated at the time of the issuance of the SIS.

#### C. 3. Law

133. As provided in D.2.: “Are the facts concerning Ream, Teuk Sap, Kang Keng, and Kratie open for investigation in the SIS?” The facts concerning Ream, Teuk Sap, Kang Keng, and Kratie are not provided in the SIS; however, some of them are stated in the 31 October 2014 SS. The National PTC Judges will, therefore, consider whether or not the investigative action on those facts are pursuant to IR 55.

134. IR 55 (2) and (3) provides that the CIJs shall only investigate the facts set out in an IS or a SS. During an investigation, new facts come to the knowledge of the CIJs, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the CIJs shall not investigate them unless they receive a SS from the Co-

<sup>190</sup> Kang Keng Response, para. 42.

<sup>191</sup> The Second Introductory Submission regarding the Revolutionary Army of Kampuchea, para. 96.

<sup>192</sup> The Second Introductory Submission, para. 42.

<sup>193</sup> International Co-Prosecutor’s Supplementary Submission regarding Crime Sites related to Case 003, 31 October 2014, paras 12 and 13, D120.



Prosecutors.

135. IR 53, paragraph 1 aforementioned clearly provides that the IS is a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the CIJs, investigating any facts which the Co-Prosecutors believe that crimes within the jurisdiction of the ECCC have been committed.

136. Pursuant to IR 55, paragraphs 2 and 3, the SS is also a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the CIJs, investigating any *new facts* which the Co-Prosecutors believe that crimes within the jurisdiction of the ECCC have been committed in addition to the existing facts set out in the Introductory Submission.

137. Pursuant to IR 53, paragraph 1 and IR 55, paragraphs 2 and 3, the National PTC Judges find that the SS is a submission for opening judicial investigation or for starting to carry out acts in accordance with the competence of the CIJs, investigating “*new facts which do not contain in the IS*”, but not a submission for “clarification” on the existing facts set out in the IS; for example, the ICP’s SS dated 31 October 2014.

138. Therefore, the National PTC Judges find that the CIJ may not investigate the facts concerning Ream, Teuk Sap, Kang Keng, and Kratie that are not open for investigation in the SIS. Even if these facts are set out in the 31 October 2014 SS, the CIJ may not investigate them because the 31 October 2014 SS is invalid.<sup>194</sup> Moreover, supposing the 31 October 2014 SS was valid, the investigative action on those facts had been undertaken before the issuance of the 31 October 2014 SS.

139. The National PTC Judges further clarify that even if these facts were investigated in the SIS, the NCP and ICP expressed their dissenting opinions on the issuance of the IS in Case 003, in which the ICP requested to submit the SIS, while the NCP requested not to, on the grounds that “these suspects are not senior leaders and/or those most responsible.”<sup>195</sup> The dissent was then appealed before the PTC. The National and International PTC Judges also

<sup>194</sup>

Case 003 (PTC 26), Considerations of [REDACTED] Appeal against the International Co-Investigating Judge’s Re-Issued Decision on [REDACTED] Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8, paras 21 to 27.



<sup>195</sup> National Co-Prosecutor’s Response to the Pre-Trial Chamber’s Direction to Provide Further Particulars, dated 24 April 2009, and National Co-Prosecutor’s Additional Observations, 22 May 2009, para. 86(A).



expressed their dissenting opinions, in which the National Judges are in favour of the NCP's arguments, while the International Judges are in favour of the ICP's arguments.<sup>196</sup> Therefore, the CIJ may not investigate the facts concerning Ream, Teuk Sap, Kang Keng, and Kratie.

140. For all of the arguments stated herein, the National PTC Judges find that all investigative action concerning Ream, Teuk Sap, Kang Keng, and Kratie should be annulled.

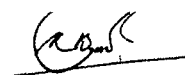
Phnom Penh, 13 September 2016

**PRAK Kimsan**



**NEY Thol**



**HUOT Vuthy**

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<sup>196</sup> Opinions of Judge PRAK Kimsan, Judge NEY Thol, and Judge HUOT Vuthy, 17 August 2009.

**OPINION OF JUDGES BEAUVALLET AND BAIK  
(THE “UNDERSIGNED JUDGES”)**

**I – WITNESS ██████████ APPLICATION**

141. The International Co-Investigating Judge accepted that the Co-Lawyers identified procedural defect and prejudice.<sup>197</sup> However, contrary to other applications considered above,<sup>198</sup> the Undersigned Judges observe that the International Co-Investigating Judge did not find the submissions *prima facie* logically consistent and reasoned. Instead, he noted that the Co-Lawyers’ premise was incorrect<sup>199</sup> and took the view that there was no “arguable basis” to sustain the procedural defect alleged.<sup>200</sup>

142. The Undersigned Judges concur with the International Co-Investigating Judge inasmuch as there is no specific provision governing initial contact between investigators and witnesses. They further note that the Co-Lawyers’ contention, according to which the discussion between the investigator and Witness ██████████ on 13 October 2014 was not an initiation of contact but a formal and substantive interview, is pure speculation.<sup>201</sup> For these reasons, the Undersigned Judges find that the application for annulment of all investigative action concerning the witness is manifestly unfounded in law and in fact and that it has no prospect of success.

143. Accordingly, the Undersigned Judges hold that the International Co-Investigating Judge rightly declined to refer the application concerning Witness ██████████.

**II – KRATIE APPLICATION**

**A. Preliminary Remarks**

144. In the course of the initial appearance of the Charged Person, wherein charges were laid against him, the International Co-Investigating Judge rescinded a number of charges, some of which were directly connected to Sector 505 in Kratie Province.<sup>202</sup> He advised the

<sup>197</sup> Impugned Decision, paras 49, 50.

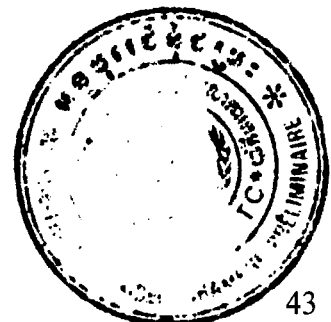
<sup>198</sup> *See supra* paras 46, 48.

<sup>199</sup> Impugned Decision, para. 52.

<sup>200</sup> Impugned Decision, para. 53.

<sup>201</sup> ██████████ Application, paras 12-13.

<sup>202</sup> Written Record of Initial Appearance, 14 December 2015, D174, p. 10.



Charged Person of his recharacterisation of the charges and rescindment of the charge of grave breaches of the Geneva Conventions in connection with purges of Division 117 and Sector 505 cadre and the charges of wilful killing and crimes against humanity pertaining to civilian cadre in Sector 505, Kratie Province. Nonetheless, the charges connected to the crimes committed during the purges of Division 117 as crimes against humanity and wilful killing (violation of Articles 501 and 506 of the 1956 Cambodian Penal Code) still stand.<sup>203</sup>

145. Recharacterisation of the charges must not affect the ambit of the initial matter laid before an investigating judge, as circumscribed by an introductory submission. Whereas all of the charges connected to purges of civilians in Sector 505 in Kratie Province were amended, the Undersigned Judges consider that regard must be had as to whether the procedural action is flawed. Where investigative action is undertaken *ultra vires* and where prejudice is established, such action should be annulled. The Undersigned Judges do not regard the application as moot and will accordingly entertain it in its entirety.

### B. Submissions of the parties

146. The Co-Lawyers maintain that the Introductory Submission did not identify the alleged Kratie purges and so the International Co-Investigating Judge's investigations thereon are in breach of Internal Rule 55(2), which provides that only the facts set forth in the Introductory or Supplementary Submission may be investigated.<sup>204</sup> This constitutes a procedural defect which harms ██████████, in that it expands the scope of the investigation against him and renders the proceedings unfair by violating the necessary separation of powers.<sup>205</sup>

147. The Co-Lawyers argue that the Introductory Submission makes no mention of Kratie, Sector 505 or Division 117 under the head of Crimes.<sup>206</sup> They concede that the alleged purges of Division 117 military personnel could be investigated inasmuch as to do so assists in establishing the elements of the alleged joint criminal enterprise or the jurisdictional elements of the crimes. The Co-Lawyers contend, however, that the purges may not be investigated as

<sup>203</sup> Written Record of Initial Appearance, 14 December 2015, D174, p. 3, 5, 8.

<sup>204</sup> Kratie Application, paras 8-9.

<sup>205</sup> Kratie Application, para. 27.

<sup>206</sup> Kratie Application, para. 13.



distinct crimes<sup>207</sup> and that the purges of civilian cadre may not be investigated on the pretext of a nexus with the joint criminal enterprise, whose alleged aim solely encompassed enemies and traitors from the RAK.<sup>208</sup>

148. Further, the Co-Lawyers submit, paragraphs 43 and 62 of the Introductory Submission do not seise the Co-Investigating Judges with the Kratie purges.<sup>209</sup> The nexus between the purges and S-21, or that between the purges and Vietnamese territory is in their view, too oblique, for such facts to be considered indivisible or an aggravating circumstance.<sup>210</sup> The Introductory Submission, therefore, did not seise the Co-Investigating Judges with facts connected to the Kratie purges and nor did the Supplementary Submission, founded as it was on that flawed investigation and signed by a single Co-Prosecutor.

149. The International Co-Prosecutor's Response counters that the movant failed to establish procedural defect or that the acts committed at the *loci in quo* constitute new facts.<sup>211</sup> Instead, the International Co-Prosecutor contends that national law and ECCC law allow the Co-Investigating Judges to investigate facts to which an Introductory Submission makes no express reference,<sup>212</sup> that the facts concerning the Kratie purges are indivisibly bound to the facts to which paragraph 43 of the Introductory Submission expressly adverts and are inseverable from the imprisonment and execution of prisoners in S-21.<sup>213</sup> By way of alternative submission, the International Co-Prosecutor submits that the Co-Investigating Judges may undertake urgent summary verifications of facts to which no express reference is made but may not engage in coercive acts before the Supplementary Submission is issued – a state of affairs which held true in the matter *sub judice*. Hence, even where the facts are new, the investigative action are not amenable to annulment.<sup>214</sup> Lastly, the International Co-Prosecutor submits that the movant failed to establish prejudice and even were the Chamber to find the alleged prejudice established, the movant has not shown that annulment would be the proper remedy in the matter at bar.<sup>215</sup>

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Kratie Application, para. 14.

<sup>210</sup> Kratie Application, paras 17-18.

<sup>211</sup> Response to Kratie Application, paras 10-20.

<sup>212</sup> Response to Kratie Application, paras 10-17.

<sup>213</sup> Response to Kratie Application, paras 18-20.

<sup>214</sup> Response to Kratie Application, paras 21-23.

<sup>215</sup> Response to Kratie Application, paras 30-33.



### C. Consideration of the Merits

150. The Undersigned Judges take the view that only consideration of the Introductory Submission and its annexes will determine whether the subsequent investigations and impugned acts were within the scope of the matter laid before the Co-Investigating Judges. If outwith the scope, the investigations will be unsubstantiated.<sup>216</sup>

151. The Undersigned Judges note, as do the Co-Lawyers, that the International Co-Prosecutor's Introductory Submission makes no specific reference to the purges of Division 117 or of civilian cadres in Sector 505, Kratie Province. Therefrom the Co-Lawyers conclude that the Co-Investigating Judges were not seised of those facts, thus raising the matter of the parameters of the matter laid before the Co-Investigating Judges.

152. It would be incorrect, in the Undersigned Judges' view, to claim that since no specific reference is made to the alleged Kratie purges, they fall manifestly outwith the matter laid before the Co-Investigating Judges, whose investigation is limited by the alleged criminal acts defined by the Co-Prosecutors in said Submission. However, it rests with the Judge to elicit the circumstances of their occurrence, in particular and the *locus in quo*, and the time of and persons involved in their commission. Imprecision as to the facts in the Introductory Submission does not preclude judicial investigation.<sup>217</sup>

153. The Undersigned Judges must therefore consider whether, even if unmentioned in the Introductory Submission, the acts committed during the purges fall within the matter before the Co-Investigating Judges for determination. It is self-evident that to fall within the ambit of the judicial investigation, the acts allegedly committed during the purges of Division 117 or of civilian cadre in Sector 505, Kratie, must form part of the factual allegations advanced by the International Co-Prosecutor. Before it makes a ruling, the Undersigned Judges must, therefore, engage in careful and meticulous scrutiny of the Introductory Submission to ascertain or rule out that the sites at issue are encompassed by the crime base, as defined in the International Co-Prosecutor's Introductory Submission.

154. The factual allegations and attendant circumstances are stated with varying degrees of precision. The Undersigned Judges note that the Introductory Submission sets out three

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<sup>216</sup> Decision on Two Applications for Annulment, para. 4.

<sup>217</sup> *Ibid.*, para. 14.



categories of facts: (i) the precise facts stated at paragraphs 43 to 64 of the Introductory Submission, adverting in general to one or more circumstances, namely a location, date, timeframe or unit etc.; (ii) the acts referred to at paragraphs 65 and 66 of the Introductory Submission, committed in “various other unnamed security centers run by the Divisions of the RAK”<sup>218</sup> and “[...] and other purge sites”<sup>219</sup> – the inclusion of paragraphs 65 and 66 under the general head of “Crimes” leaves no doubt that they form part of the International Co-Prosecutor’s factual allegations; and (iii) the factual allegations at paragraph 42 of the Introductory Submission. The third category purports to seize the judges only under certain restrictive conditions.<sup>220</sup>

155. The Undersigned Judges will consider (a) whether the purges of Division 117 personnel fall within one of the first two categories, which would suffice for them to be regarded as within the bounds of the matter brought before the Co-Investigating Judges, then proceed likewise for the civilian cadre from Sector 505 ; and (b) if the above does not hold true, the Undersigned Judges would have to ascertain the inclusion of the purges by virtue of paragraph 42 of the Introductory Submission and the possible ambit of the matter so referred.

#### 1. Purges of Division 117 personnel

156. Firstly, the Undersigned Judges note that the Introductory Submission adverts to the Division 117 and the Kratie purges. At paragraph 23 of the Introductory Submission, under the head of “RAK structure”, Division 117 of the RAK is stated as among those located in the North Zone. Footnote 129 of the Introductory Submission makes reference to the alleged Kratie purges to sustain the allegation that “[t]he purge of the RAK was part of a series of purges of internal enemies that the CPK instigated throughout Democratic Kampuchea”.<sup>221</sup> The footnote quotes the May-June 1978 edition of a CPK magazine: “On the other hand, we have smashed the traitorous leading apparatus throughout the country together with their faction; concretely, the traitorous forces in the East, Northwest and West Zones, in

<sup>218</sup> Introductory Submission, paras 6, 65-66.

<sup>219</sup> Introductory Submission, paras 65-66.

<sup>220</sup> Introductory Submission, para. 42: “The requested judicial investigation is not limited to the facts specified in paragraphs 43 to 66 below, but extends to all facts referred to in this Second Introductory Submission provided those facts assist in investigating: (1) the jurisdictional elements necessary to establish whether the factual situations specified in paragraphs 43 to 66 constitute crimes within the jurisdiction of the ECCC; or (2) the mode of liability of the Suspects named in this Submission.”.

<sup>221</sup> Introductory Submission, para. 36.





Phnom Penh, in 103, in *Kratie* and in Sector 25 [emphasis added]”.<sup>222</sup>

157. Second, Undersigned Judges note that paragraph 43 of Introductory Submission, entitled “S-21 Security Centre”, under the head of the Crimes, concerns the alleged purges of various RAK divisions and the sending of military personnel in their thousands there for execution. The paragraph, it must be underscored, refers to at least 4,557 S-21 prisoners from RAK military units, and states that such personnel were from the ranks of all regular divisions.<sup>223</sup> The use of “including” suggests to the Undersigned Judges that the RAK divisions sent to S-21 are not listed exhaustively,<sup>224</sup> but by way of illustration and does not preclude other divisions.

158. In fact, whereas the International Co-Prosecutor was unapprised of all of the army divisions purged, he had reason to believe that the crimes which he laid before the Co-Investigating Judges were committed not only against those divisions enumerated at paragraph 43 of the Introductory Submission but against other, regular RAK divisions, which it rested with the Co-Investigating Judges to discover. Paragraph 43 seises the Investigating Judges with facts concerning victims from various regular divisions whom were purged and sent to S-21. Although the Introductory Submission describes it as one of the “regional” divisions,<sup>225</sup> the Undersigned Judges note that, having regard to the results of the investigation, Division 117 was, in fact, akin to a regular division which reported “directly to the General Staff”.<sup>226</sup> The Undersigned Judges are further of the view that much of the evidence given by the witnesses reports that Division 117 fell under the immediate authority of the General Staff.<sup>227</sup> That the International Co-Prosecutor was unapprised of such evidence at the time of filing the Introductory Submission does not mean that the facts are not included in the matter laid before the Co-Investigating Judges. That paragraph of the Introductory Submission clearly encompasses the Division 117 purges.

159. Thirdly, the Undersigned Judges note that various annexes cited at paragraph 43 of the

<sup>222</sup> Introductory Submission, footnote 129.

<sup>223</sup> Introductory Submission, para. 43.

<sup>224</sup> *Ibid.*

<sup>225</sup> Introductory Submission, para. 23.

<sup>226</sup> Introductory Submission, para. 21.

<sup>227</sup> Written record of interview of Witness ██████████, 14 February 2014, D54/63, question 15; Written record of interview of Witness ██████████, 13 February 2014, D54/62, question 4; Written record of interview of Witness ██████████, 22 February 2015, D114/52, question 4 *et seq.*; Telegram from Division 117 reporting to the General Staff, dated 2 March 1978, D4.1.313.



Introductory Submission refer to Division 117 personnel sent to S-21.<sup>228</sup> Footnotes 145, 147, 148 and 155 of the Introductory Submission, adverted to by way of illustration of the purges of personnel of RAK divisions who were sent to S-21, refer to lists of S-21 prisoners, some of whom are specified to be Division 117 personnel.

160. Be that as it may, the Undersigned Judges consider that paragraph 43 of the Introductory Submission seises the Co-Investigating Judges solely with purges of RAK personnel sent to S-21. The facts connected to the sending of personnel from units adverted to in the paragraph to security centres other than S-21 cannot be regarded as falling within the ambit of the matters laid before the Co-Investigating Judges by virtue of paragraph 43.

161. Furthermore, the Undersigned Judges note that the activities and organisation of Division 164 prompted a number of witnesses to speak of the arrival of personnel from that division in Kratie and to refer to the purges that took place there.<sup>229</sup> Division 164 personnel allegedly came to Kratie in 1978 to mount operations<sup>230</sup> and the Charged Person, it is claimed, took part in meetings which culminated in the purges in question.

162. The Undersigned Judges note that paragraph 54 of the Introductory Submission laid before the Co-Investigating Judges facts concerning the purges committed by Division 164. Accordingly, investigative action concerning the movements, meetings and activities of Division 164 in connection with the Division 117 purges has a direct nexus with the facts brought before the Investigating Judge.

163. Furthermore, the Undersigned Judges note that paragraph 66 of the Introductory Submission concerning “other purge sites” also encompasses the purges of RAK personnel in Kratie.<sup>231</sup> As put by the International Co-Prosecutor: “[i]t also appears that RAK members were purged during the Central Zone (the Old North Zone) purge, the New North Zone purge, and the East Zone purge.”<sup>232</sup> The Undersigned Judges recall that the Introductory Submission

<sup>228</sup> List of S-21 prisoners, D57-Annex 273, dated December 1978, D1.3.28.141, cited in footnotes 145, 147, 148 and 155 of the Introductory Submission; List of names of prisoners interrogated in S-21, D1.3.28.146.

<sup>229</sup> Written record of interview of Witness ██████████, 13 February 2014, D54/62, answers 26-31; Written record of interview of Witness ██████████, 18 October 2013, D54/23, answers 8 *et seq.*; Written record of interview of Witness ██████████, 14 January 2014, D54/50, answers 5-22.

<sup>230</sup> *Ibid.*

<sup>231</sup> Introductory Submission, para. 66.

<sup>232</sup> *Ibid.*



refers to Division 117 in Kratie as part of the North Zone.<sup>233</sup> Accordingly, it is reasonable to believe that the Investigating Judges were seized of the purges of military personnel in Kratie inasmuch as they appear in the final sentence of paragraph 66 of the Introductory Submission, which seises the Investigating Judges of purges at that site.

164. In the opinion of the Undersigned Judges, the internal RAK purges form the crux of the investigations with which the Co-Investigating Judges are charged. The International Co-Prosecutor has, moreover, specified that the object of the alleged joint criminal enterprise was “to identify members of the Revolutionary Army of Kampuchea (“RAK”) who were perceived to be enemies or traitors and to subject them to arbitrary arrest, unlawful detention, inhumane treatment, and, in many cases, torture and execution.”<sup>234</sup>

165. In the light of all of the foregoing, the Undersigned Judges consider that the facts connected to the purges of Division 117 fall within the ambit of the investigations with which the Co-Investigating Judges were charged by virtue of the Introductory Submission and from that time onward. The facts particularise the purges of RAK divisions at paragraph 43 *et seq.* and paragraph 66, and the Undersigned Judges need not, therefore, expound on the inclusion of such facts in the matters *sub judice* as referred by virtue of paragraph 42 of the Introductory Submission.

## 2. Purges of civilian cadre in Sector 505

166. The Undersigned Judges note that the Summary of Facts in the Introductory Submission reads: “[The CPK] also executed many tens and possibly hundreds of thousands of its own cadres in the belief that they were ‘enemies’ infiltrating all administrative, political and military levels”.<sup>235</sup> Moreover, according to the International Co-Prosecutor: “The CPK conducted repeated purges in which people were removed from positions of authority and killed (‘smashed’) because of real or perceived opposition to the CPK.”<sup>236</sup>

167. The Undersigned Judges would remark, however, as do the Co-Lawyers,<sup>237</sup> that paragraph 43 of the Introductory Submission, included under the head of Crimes, concerns

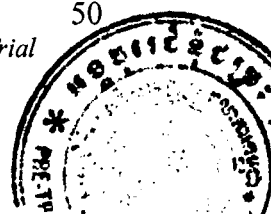
<sup>233</sup> Introductory Submission, para. 23.

<sup>234</sup> Introductory Submission, para. 33.

<sup>235</sup> Introductory Submission, para. 10.

<sup>236</sup> Introductory Submission, para. 11.

<sup>237</sup> Kratie Reply, para. 6.



purges of military units and not civilian cadre of Sector 505. The International Co-Prosecutor was apprised of the fact that scores of civilians were sent to S-21. The breakdown so attests: 4557 of the 12380 prisoners were from military units.<sup>238</sup> And yet, he made a deliberate choice to focus paragraph 43 on the purges of military units.

168. The Undersigned Judges note, however, that from the investigations and impugned evidence of witnesses it appears that the purges of Division 117 and Sector 505 cadre are entwined inasmuch as the arrests which [REDACTED] allegedly oversaw when he came to the area were of Division 117 personnel *and* Sector 505 cadre.<sup>239</sup> Further still, following their arrest, [REDACTED] allegedly convened a meeting with the remainder of Division 117 *and* the Sector 505 cadre who were not under arrest.<sup>240</sup> The impugned evidence draws no distinction between arrests of Division 117 personnel and arrests of civilian cadre. The arrests were allegedly contemporaneous; arrestees were allegedly brought to S-21 together and the subsequent meeting convened both the military and civilians.<sup>241</sup>

169. Accordingly, in the view of the Undersigned Judges, it is reasonable to determine that the purges of civilian cadre in Sector 505 were indivisibly bound to the purges of Division 117 military personnel which, as aforementioned,<sup>242</sup> are placed before the Co-Investigating Judges for consideration. As a result of that connection both geographical and temporal, the arrests of civilian cadre are not facts in issue which could be the subject of discrete, specific allegations of crimes, but nonetheless constitute circumstances of the Division 117 purges.

170. In sum, the Undersigned Judges consider that far from constituting new facts, the content of the statements taken amounts instead to evidence duly gathered in the course of the investigation with which the Investigating Judges were tasked from the Introductory Submission. Accordingly, the Undersigned Judges deny the Kratie Application for annulment.

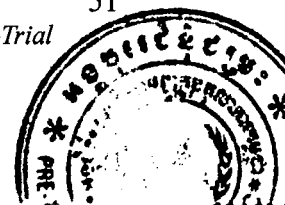
<sup>238</sup> Introductory Submission, para. 43.

<sup>239</sup> Written record of interview of Witness [REDACTED], 13 August 2013, D54/60.2, pp. 36-42; Written record of interview of Witness [REDACTED], 13 February 2014, D54/62, answer 24; Written record of interview of Witness [REDACTED], 11 November 2009, D4.1.810, answers 35-36.

<sup>240</sup> Supplementary Submission, para. 13.

<sup>241</sup> Written record of interview of Witness [REDACTED], 13 February 2014, D54/62, answers 29-30.

<sup>242</sup> See *supra* paras 156-165.



### III – KANG KENG APPLICATION

#### A. Submissions of the parties

171. In their initial application<sup>243</sup> and the Appeal,<sup>244</sup> the Co-Lawyers sought the annulment of all investigative action concerning the Kang Keng forced labor and re-education sites. The Co-Lawyers argue that said crime sites were not pinpointed in the Introductory Submission and the International Co-Investigating Judge's investigations of the sites are, therefore, in violation of Internal Rule 55(2), which provides that only the facts alleged in an introductory or supplementary submission may be investigated.<sup>245</sup> The International Co-Investigating Judge's investigations, they maintain, constitute a procedural defect prejudicial to the Charged Person by expanding the scope of the investigations against him and violating his right to notice of the charges resting against him.<sup>246</sup>

172. The reference to Kang Keng at paragraph 86(a) of the Introductory Submission on [REDACTED] authority is, in their view, too general and insufficient to seize the Co-Investigating Judges of these sites as crime sites.<sup>247</sup> They further argue that in a similar instance in Case 002 the Co-Investigating Judges found that they had not been seized of facts that would allow them to investigate the places as crime sites.<sup>248</sup> The Co-Lawyers acknowledge that the International Co-Investigating Judge could investigate Kang Keng but for the sole purpose of determining [REDACTED] authority vis-à-vis the city of Kang Keng, the contextual elements of the crimes and the modes of liability, as set forth at paragraph 42 of the Introductory Submission. Nonetheless, the Co-Lawyers take issue with the fact that the rogatory letter concerning Kang Keng did not confine the ambit of the investigation to said parameters.<sup>249</sup>

173. The International Co-Prosecutor takes the view that the Kang Keng forced labour and re-education sites fall within the purview of paragraph 52 of the Introductory Submission on

<sup>243</sup> Kang Keng Application, para. 30.

<sup>244</sup> Appeal, paras 32-35.

<sup>245</sup> Kang Keng Application, paras 8-12.

<sup>246</sup> Kang Keng Application, paras 26-29.

<sup>247</sup> Kang Keng Application, paras 11-12.

<sup>248</sup> Kang Keng Application, para. 12, *citing* Case 002, Order on Co-Prosecutors' Request for Investigative Action Regarding Boeung Trabek & Chraing Chamres Re-Education Offices, and Clarification of Allegations in the Introductory Submission, 13 January 2010, D266/2, para. 5.

<sup>249</sup> Kang Keng Application, para. 20.



the “frequent and arbitrary arrests and forced labor” to which Division 164 personnel were subjected.<sup>250</sup> The sites, in his view, are part and parcel of the investigation into the extent and organisation of Division 164’s internal security mechanisms. Kang Keng is indivisible from the operations of this Division, as one of several of the forced labor sites under its control, which included Stung Hav Rock Quarry.<sup>251</sup> The proximity of Kang Keng to other sites in Division 164, including Bet Trang, Ream and Tuek Sap place it squarely in the geographic area of Division 164 over which [REDACTED] wielded authority.<sup>252</sup>

174. The Co-Lawyers counter that geographical proximity does not bind a co-investigating judge to investigate crimes committed in the vicinity of those of which he or she is seised.<sup>253</sup> Paragraph 52 of the Introductory Submission on crimes related to Division 164 is an overview, which does not seise the Investigating Judges with any particular location; location is addressed at paragraphs 56 to 65, which contain no reference to Kang Keng.<sup>254</sup> The responsibility of Division 164 is not under investigation, since the Investigating Judges are seised *in rem* of specific crimes, and, in the matter at bar, the purpose of the investigation is not to uncover all of the crimes which that Division may have committed.<sup>255</sup>

### B. Consideration of the Merits

175. The Undersigned Judges note, as do the Co-Lawyers,<sup>256</sup> that the part of the Introductory Submission addressing alleged crimes contains no reference to Kang Keng, which is adverted to only in the section on [REDACTED] authority. Here again the Undersigned Judges take the view that only consideration of the Introductory Submission and its annexes will determine whether the subsequent investigations and impugned acts were within the scope of the matter laid before the Co-Investigating Judges. If outwith the scope, the investigations will be unsubstantiated.

176. The Undersigned Judges recall its earlier findings as to the extent to which the factual allegations are stated with precision in the Introductory Submission and makes clear that it

<sup>250</sup> Response to Kang Keng Application, para. 21.

<sup>251</sup> Response to Kang Keng Application, para. 20.

<sup>252</sup> *Ibid.*

<sup>253</sup> Ream, Tuek Sap and Kang Keng Reply, para. 13.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> Kang Keng Application, para. 11.



will undertake the same analysis as above.<sup>257</sup>

177. The Undersigned Judges first note an express reference to Kang Keng at paragraph 86(a) of the Introductory Submission on [REDACTED] legal and factual authority: [REDACTED] “was responsible for defending Cambodia’s coast, including the towns of Kampong Som, Ream and *Kang Keng* [emphasis added].”<sup>258</sup>

178. The Undersigned Judges further note that, in a response to one of the Reserve International Co-Investigating Judge’s forwarding orders, the International Co-Prosecutor stated that the Bet Trang site was in the vicinity of Kang Keng airport and, as such, could be regarded as a single site falling within the scope of the judicial investigation.<sup>259</sup> The International Co-Prosecutor then sought to clarify his position, maintaining that Kang Keng was included in the factual allegations laid before the Co-Investigating Judges.<sup>260</sup>

179. In his overview of the crimes in the Introductory Submission, the International Co-Prosecutor asserts that “[t]here is evidence that Division 164 personnel were subjected to frequent and arbitrary arrests and forced labor”.<sup>261</sup> Although the International Co-Prosecutor did not specify the circumstances, particularly as regards locus, the Co-Investigating Judges are, in his view, thereby seised of the allegations. The acts allegedly committed in Kang Keng, constitute, in the view of the International Co-Prosecutor, one of the sites of commission of those crimes.<sup>262</sup>

180. An analysis of the impugned witness interviews shows that the questions put to the witnesses on Kang Keng and their replies concerned the nexus between Division 164 and the purges of military units.<sup>263</sup> By virtue of paragraphs 52 to 54 of the Introductory Submission,

<sup>257</sup> See *supra* paras 154-155.

<sup>258</sup> Introductory Submission, para. 86 a).

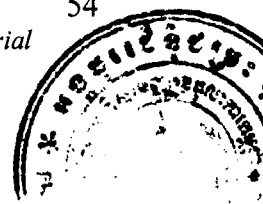
<sup>259</sup> International Co-Prosecutor’s Response to Forwarding Order of 24 April 2012, 21 June 2012, D47/1, para. 8.

<sup>260</sup> Supplementary Submission, para. 7 *et seq.*

<sup>261</sup> Introductory Submission, para. 52.

<sup>262</sup> Response to Kang Keng Application, paras 21-22.

<sup>263</sup> Written record of interview of Witness [REDACTED], 19 June 2013, D54/8: in connection with arrests of Division 164, the investigators asked the witness whether he had “ever hear[d] about Kang Keng airport” He replied: “My Regiment 22 was stationed at Kang Keng Airport. Our workplaces were around that airport.” When asked by the investigators if he had ever seen them bring people to work near Kang Keng airport, the witness replied that he had not, adding: “Kang Keng Airport was the base of Regiment 22.”; Written record of interview of Witness [REDACTED], 14 August 2013, D54/17: the witness gave the location of the command of a battalion of Regiment 22, on the other side of Kang Keng airport. The witness went on to say that the brick kiln near Kang Keng was “a Division 164 labour site”, that the labourers included civilians and military personnel, conditions there were normal and that [REDACTED] came only to inspect the site; Written record of interview of



the arrests of Division 164 personnel and the forced labour exacted of them are laid before the Investigating Judges under the head of Crimes. There appears to be a direct nexus between the crimes committed against Division 164 and the Kang Keng sites, particularly because some personnel of Regiment 22, which was part of the Division, were stationed at Kang Keng.<sup>264</sup>

181. The Undersigned Judges would first note in this respect the geographical proximity between the Wat Eng Thea Nhien security centre, Bet Trang and Kang Keng.<sup>265</sup> Bet Trang and Kang Keng are separated by but a few kilometres.<sup>266</sup>

182. Second, the Undersigned Judges point out that various witnesses<sup>267</sup> in the proceedings at bar attest to the forced labour exacted of those arrested, including of personnel from Division 164, which was purged in Kang Keng and later in Stung Hav – another site before the Co-Investigating Judges for consideration.<sup>268</sup> The victims of the purges included Division 164 personnel, and accordingly are encompassed by the matter placed before the Co-Investigating Judges for determination.

183. In the annex to the Introductory Submission, the Undersigned Judges further note a reference to Kang Keng as the site of the arrest of soldiers by a Division 164 member. The minutes of a military meeting, “Minutes of Meeting of 164 Comrades”, appear as a footnote to the following sentence in the Introductory Submission: “the commander of Division 164 reported on several occasions that internal enemies had been arrested”.<sup>269</sup> The Undersigned

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Witness ██████, 13 November 2013, D54/36 states that the two battalions of the mobile unit performed construction work near Kang Keng airport. The two battalions were under the command of Division 164. The investigator also asked whether the witness had heard of the durian, orange and coconut farms near Kang Keng airport. The witness replied that he had heard only of the coconut farm because he had worked nearby. The written record then states that the witness was moved from Kang Keng to Stung Hav; Written record of interview of Witness ██████, 10 December 2013, D54/43: the investigators stated: “According to information we have, after they had been released, the former military officers of Battalion 310 were sent to join mobile units working at Preaek Chak, located next to Kang Keng airport, they were considered suspicious people.” The witness so confirmed.

<sup>264</sup> Written record of interview of Witness ██████, 19 June 2013, D54/8, p. 7; Written record of interview of Witness ██████, 14 August 2013, D54/17, answers 14-15; Written record of interview of Witness ██████, 24 August 2010, D2/6, p. 7; Written record of interview of Witness ██████a, 28 July 2014, D54/113, questions 12-13.

<sup>265</sup> Site identification Report, Marine Division 143 (div 3) sites, D114/54, pp. 8, 27.

<sup>266</sup> Supplementary Submission, paras 7, 18.

<sup>267</sup> Written record of interview of Witness ██████, 28 April 2015, D114/65, pp. 5-9; Written record of interview of Witness ██████, 13 November 2013, D54/36, pp. 5-7.

<sup>268</sup> Introductory Submission, para. 6.

<sup>269</sup> Introductory Submission, para. 52, footnote 216: minutes of a Democratic Kampuchea military meeting entitled “Minutes of Meeting of 164 Comrades”, dated 9 September 1976, ERN 00162488-00162490.





Judges note that this sentence is included by way of example of the allegations of crimes of arrests and forced labour to which that military personnel was subjected, and, akin to the International Co-Prosecutor, they take the view that the evidence concerning Kang Keng elucidate the scale and organisation of security mechanisms and purges vis-à-vis Division 164.

184. The Undersigned Judges see no ambiguity in the ambit of the matter brought before the Co-Investigating Judges as regards the Division 164 purges. Since the crimes were laid before them, it rested with the Judges to inquire as to the circumstances of their commission, and in particular those circumstances which identify location. Wat Eng Tea Nhien<sup>270</sup> and Stung Hav rock quarry are not the sole sites of crimes allegedly perpetrated against Division 164 personnel. Far from acting *ultra vires*, the International Co-Investigating Judges contributed to the manifestation of the truth by elucidating the factual circumstances set out at paragraphs 52 to 54 of the Introductory Submission. In light of the considerations aforementioned, the Undersigned Judges regard the Kang Keng forced labour and re-education sites as circumstances which identify the location of the offences expressly adverted to in said paragraphs and accordingly find that the facts to which the witnesses attest fall within the purview of the investigations which said Introductory Submission binds the Co-Investigating Judges to undertake. The Kang Keng Application for annulment is accordingly dismissed.

#### IV – TUEK SAP APPLICATION

##### A. Submissions of the parties

185. In the Tuek Sap Application and the Appeal, the Co-Lawyers submit that the Co-Investigating Judges are not seised of Tuek Sap as the Introductory Submission makes no mention of the site and it is not alleged that Division 164 had any security centres other than Wat Eng Tea Nhien.<sup>271</sup> Hence, the Co-Lawyers maintain, the Co-Investigating Judges are precluded from investigating paragraphs 52 to 54 of the Introductory Submission,<sup>272</sup> which are merely an “Overview of Crimes” and insufficiently specific to seise the Investigating

<sup>270</sup> Introductory Submission, paras 55-58.

<sup>271</sup> Tuek Sap Application, para. 11.

<sup>272</sup> *Ibid.*



Judges with specific sites.<sup>273</sup>

186. Further, they contend, the International Co-Prosecutor's response to the Forwarding Order and the clarification which the Supplementary Submission provided do not suffice to seize the Co-Investigating Judges with Tuek Sap.<sup>274</sup> As they did in their other applications for annulment, the Co-Lawyers question the validity of the Supplementary Submission, which, they submit, cannot cure the procedural defects affecting prior investigative action and which is insufficient to seize the judges with facts concerning Tuek Sap.<sup>275</sup> They maintain that to so investigate amounts to a procedural defect which is prejudicial to [REDACTED] inasmuch as it expands the scope of the investigation against him, violates his right to notice of the case against him and duly to prepare a defence.<sup>276</sup>

187. It is the International Co-Prosecutor's submission that as one of the security centres under its control, the Tuek Sap site is indivisible from Division 164's operations.<sup>277</sup> That operational relationship, in his view, is apparent from its geographical proximity to the other sites under that Division. He maintains that paragraphs 52 *et seq.* of the Introductory Submission seize the Investigating Judges of the scale and organisation of the division's internal security mechanisms, thereby bringing the Tuek Sap site within the ambit of the matter before Judges for determination. Tuek Sap is also brought *sub judice* as one of the "various other unnamed security centers run by the Divisions of the RAK".<sup>278</sup> Lastly, he submits that the Supplementary Submission is valid,<sup>279</sup> that the prejudice alleged is, in any event, unproven and that annulment would be disproportionate.<sup>280</sup>

188. In their Reply, the Co-Lawyers recite the submissions set forth in the initial application for annulment and the Appeal. First, they further contend, Division 164's operations do not lie before the Co-Investigating Judges for consideration, but instead the crimes committed at Wat Eng Tea Nhien, which, as such, may be investigated without inquiry into the other security centers to which the detainees were moved.<sup>281</sup> Further, they maintain

<sup>273</sup> *Ibid.*

<sup>274</sup> Tuek Sap Application, para. 16.

<sup>275</sup> Tuek Sap Application, paras 24-25.

<sup>276</sup> Tuek Sap Application, paras 28-31.

<sup>277</sup> Response to Tuek Sap Application, paras 17-19.

<sup>278</sup> Response to Tuek Sap Application, paras 20-21.

<sup>279</sup> Response to Tuek Sap Application, paras 29-31.

<sup>280</sup> Response to Tuek Sap Application, para. 35.

<sup>281</sup> Ream, Tuek Sap and Kang Keng Reply, para. 11.



that contrary to the International Co-Prosecutor's assertions, paragraphs 65 and 66 seize the Co-Investigating Judges with security centres of RAK divisions other than Divisions 502, 164 and 801.<sup>282</sup>

### B. Consideration of the Merits

189. The Undersigned Judges' analysis will follow the aforementioned *modus operandi*.<sup>283</sup>

190. At the outset, the Undersigned Judges note that the International Co-Investigating Judge was the first to raise this issue and to cast doubt on the reach of the matter laid before him as regards Tuek Sap. His Forwarding Order directed the Co-Prosecutors to advise the Co-Investigating Judges whether to consider themselves seized of the acts committed at Tuek Sap security centre or whether they constitute new facts.<sup>284</sup> In response, the International Co-Prosecutor initially responded that a supplementary submission was unnecessary inasmuch as the Co-Investigating Judge may consider himself already seized of this site.<sup>285</sup> Subsequently, in his Supplementary Submission of 31 October 2014, the International Co-Prosecutor restated his position<sup>286</sup> under the head of "Clarification".

191. To fall within the ambit of the judicial investigation, the acts allegedly committed at Tuek Sap security centre must form part of the factual allegations advanced by the International Co-Prosecutor. Before it makes a ruling, the Undersigned Judges must, therefore, engage in careful and meticulous scrutiny of the Introductory Submission to ascertain or rule out that the sites at issue are encompassed by the crime base, as defined in the Introductory Submission.

192. The Undersigned Judges first note that the Introductory Submission makes no reference to Tuek Sap security centre.

193. The Undersigned Judges are of the view that the Co-Investigating Judges were seized of factual allegations that "Division 164 personnel were subjected to frequent and arbitrary

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<sup>282</sup> Ream, Tuek Sap and Kang Keng Reply, para. 11.

<sup>283</sup> *See supra* paras 154-155.

<sup>284</sup> Forwarding Order, 9 June 2014, D102.

<sup>285</sup> International Co-prosecutor's Response to Forwarding Order regarding Toek Sab Prison, 20 June 2014, D102/1, para. 3.

<sup>286</sup> Introductory Submission, paras 5, 10-11.



arrests and forced labor”<sup>287</sup> and allegations that “[certain] people [...] were sent away and may have been executed”.<sup>288</sup>

194. Of note in this regard is that a witness stated that “[Tuek Sap Prison] [...] was under the command of Division 164 Commander [REDACTED] [...] and that] [t]he victims sent there were combatants from Division 164 and some civilians”.<sup>289</sup> Evidence given by another witness refers to Tuek Sap as a Division 164 detention centre, where “when a soldier was arrested, they would be taken”<sup>290</sup> and describes it as a re-education centre.

195. The Undersigned Judges also observe that an annex to the Introductory Submission, cited as a reference at paragraph 54, which falls under the head of Overview of crimes related to Division 164, adverts to Wat Eng Tea Nhien as place of detention and Tuek Sap as place of execution.<sup>291</sup> The document is the reference for the allegation that “those people who were identified as having former regime connections were sent away and may have been executed”.<sup>292</sup>

196. Of further note is that the Introductory Submission asserts that Wat Eng Tea Nhien in Kampong Som was a Division 164 security centre.<sup>293</sup> The Undersigned Judges see that the Tuek Sap centre and Wat Eng Tea Nhien were in the same vicinity<sup>294</sup> and that at least one witness in the case at bar gave evidence as to having been detained in one and later in the other security centre.<sup>295</sup>

197. Another witness, moreover, refers to the connection between the Stung Hav site and the Tuek Sap security centre<sup>296</sup> – “For serious offence prisoners they were sent to Teuk Sap. For light offense prisoners they were sent to Steung Hav for tempering” – and the connection between Kang Keng and Tuek Sap, in explaining that he was moved from one to another for work: “at Kâng Keng, we dug canal and did rice farming while at Steung Hav we broke rocks

<sup>287</sup> Introductory Submission, para. 52.

<sup>288</sup> Introductory Submission, para. 54.

<sup>289</sup> Written record of interview of Witness [REDACTED], 19 August 2013, D54/20, p. 6.

<sup>290</sup> Written record of interview of Witness [REDACTED], 18 October 2013, D54/23, p. 12.

<sup>291</sup> Notes of interview of [REDACTED], 13 August 2008, D1.3.13.8, p. 4: “The witness stated that the Wat at Eng Tea Nhien was a detention facility. [...] There was additional killing done at the Ocheteal (Chamkar Chek) hospital near the lion. [...] Another killing site was at Toek Sap in Prey Nup district”.

<sup>292</sup> Introductory Submission, para. 54.

<sup>293</sup> Introductory Submission, para. 56.

<sup>294</sup> Site identification Report, Marine Division 143 (div 3) sites, D114/54, p. 27.

<sup>295</sup> Written record of interview of Witness [REDACTED], 29 January 2015, D114/40, pp. 5-6.

<sup>296</sup> Written record of interview of Witness [REDACTED], 13 November 2013, D54/36, pp. 6-7.



and built pier.”<sup>297</sup>

198. An analysis of the Introductory Submission, its annexes and the impugned written records of interviews makes clear the direct nexus between the Division 164 purges and the Tuek Sap detention centre.<sup>298</sup> In this respect, the Undersigned Judges note that the Introductory Submission contains no reference to Wat Eng Tea Nhien security centre as the sole Division 164 centre. To the contrary, the International Co-Prosecutor states that “[a]t least some of those [Division 164 personnel] who were purged were sent to Wat Eng Tea Nhien security center”,<sup>299</sup> suggesting that other personnel were sent to other centres which it rested with the investigating judges to discover. That the International Co-Prosecutor was unapprised of such evidence at the time of filing the Introductory Submission does not mean that the facts are not included in the matter laid before the Co-Investigating Judges. Although unapprised of all of the *loci in quo*, the International Co-Prosecutor had reason to believe that the crimes with which he seised the Co-Investigating Judges were committed not only at the sites mentioned in the Introductory Submission, such as Wat Eng Tea Nhien, but at further sites, which it rested with the Co-Investigating Judges to discover. In that sense, the statements in question do not reveal new facts, since the International Co-Prosecutor was already aware of the existence of security centres at locations hitherto undiscovered or crimes committed by military units at various locations. Rather, as evidentiary material, the statements flesh out the circumstances surrounding the facts which are set forth in the Introductory Submission.

199. Aside mere geographical proximity and the transfers of detainees from Tuek Sap security centre to Wat Eng Tea Nhien or from Tuek Sap to Stung Hav, it is apparent that the Tuek Sap centre was run by Division 164 and was where arrested personnel were sent. The site is indivisible from the allegations of repeated and arbitrary arrests of soldiers and is, therefore, a circumstance which identifies the location of the allegations concerning the “major purge”<sup>300</sup> of the division.

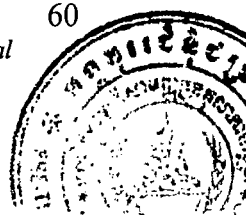
200. Thus, the Undersigned Judges consider, inasmuch as the circumstances which came to

<sup>297</sup> Written record of interview of Witness ██████████, 13 November 2013, D54/36, p. 6.

<sup>298</sup> Written record of interview of Witness ██████████, 21 August 2014, D54/117, pp. 9-16; Written record of interview of Witness ██████████, 31 July 2014, D54/114, pp. 9-10; Written record of interview of Witness ██████████, 8 August 2014, D54/116, pp. 4-5.

<sup>299</sup> Introductory Submission, para. 53.

<sup>300</sup> *Ibid.*



light in the course of interviews of witnesses conducted pursuant to a rogatory letter remain connected to the facts specified in the Introductory Submission, they duly fall within the matter placed before the Co-Investigating Judges. The facts to which the witnesses attest fall within the ambit of the investigations with which the Co-Investigating Judges were charged by virtue of the Introductory Submission and from that time onward. The Undersigned Judges hereby dismiss the application for annulment concerning the Tuek Sap security centre.

## V – REAM APPLICATION

### A. Submissions of the parties

201. The Co-Lawyers submit that the references to Ream in the Introductory Submission are too general to seise the Co-Investigating Judges with the forced labour and execution sites of Ream port and naval base.<sup>301</sup> The reference to Ream, they contend, concerns only [REDACTED] authority, no reference being made to crimes committed there.<sup>302</sup> Stung Hav Rock Quarry, a site adverted to in the Introductory Submission, is, according to the Co-Lawyers, around forty kilometres from Ream and cannot be regarded as indivisible from the events which occurred there.<sup>303</sup> The Co-Lawyers accept that the crimes committed by the Democratic Kampuchea Navy (“DK Navy”) could potentially be indivisible from Ream since the crime of capture of enemies at sea is put before the Co-Investigating Judges.<sup>304</sup>

202. The International Co-Prosecutor counters that Ream is put before the Investigating Judges as the most significant naval port under the authority of Regiment 140, as stated at paragraphs 82 and 86(a) of the Introductory Submission which make express reference to Ream.<sup>305</sup> The site, it is submitted, is geographically very proximate to other sites run by Division 164, such as Kang Keng, Bet Trang and Tuek Sap. He considers it to have formed part of a network of forced labour sites developed by Division 164 in Kampong Som which included the foregoing three sites and Stung Hav Rock Quarry.<sup>306</sup> The Co-Prosecutor notes that the Co-Lawyers have acknowledged that the detention, forced labour and execution of Thai and Vietnamese persons at Ream port are indivisible from the allegations at

<sup>301</sup> Ream Application, para. 14.

<sup>302</sup> *Ibid.*

<sup>303</sup> Ream Application, para. 16.

<sup>304</sup> Ream Application, para. 17.

<sup>305</sup> Response to Ream Application, para. 17.

<sup>306</sup> *Ibid.*



paragraphs 59 to 61, as the paragraphs explain the key role played by the DK Navy in the capture at sea of Vietnamese and Thai nationals. He notes further that the paragraphs do not circumscribe the sites to be investigated.

203. The International Co-Prosecutor further maintains that the forced labour sites in Ream commune are relevant to the organisation and scale of Division 164's internal security mechanisms. Accordingly, they are indivisible from the crimes alleged at paragraph 53 of the Introductory Submission on "frequent and arbitrary arrests and forced labor" to which Division 164 personnel were subjected.<sup>307</sup>

204. The Co-Lawyers reply that indivisibility does not ensue from geographical proximity of the sites and that no reference is made to Ream as part of a network of forced labour sites.<sup>308</sup> Whereas they could countenance investigations into Ream in connection with the capture of enemies at sea, the Co-Lawyers explain, however, that they cannot for the forced labour sites, which, it is clear, are severable from the capture and killings at sea.<sup>309</sup>

### B. Consideration of the Merits

205. The Undersigned Judges identify three references to Ream in the Introductory Submission. The first is as one of the sites where Division 164 was based, of which [REDACTED] was allegedly the Secretary.<sup>310</sup> Reference is then made to Ream as one of the towns which [REDACTED], as alleged commander of the DK Navy, was responsible for defending.<sup>311</sup> Lastly, Ream also appears at footnote 362 as the location of the "main naval base and the Division [164] headquarters".

206. Of further note is that early on in the Introductory Submission, it is stated that the crimes at bar are connected to various locations, including "the DK navy".<sup>312</sup> The Undersigned Judges take the view that the DK Navy is not a location *per se*, but gathers that the International Co-Prosecutor wished to include among the locations set out in the Introductory Submission those places where the DK Navy operated and allegedly committed

<sup>307</sup> Response to Ream Application, para. 19.

<sup>308</sup> Ream, Tuek Sap and Kang Keng Reply, para. 9.

<sup>309</sup> *Ibid.*

<sup>310</sup> Introductory Submission, para. 82.

<sup>311</sup> Introductory Submission, para. 86.

<sup>312</sup> Introductory Submission, para. 6.



crimes.<sup>313</sup> It is clear that as the main naval base Ream is perforce one of the main sites of DK Navy activity.

207. The factual allegations set forth at paragraphs 59 to 61 of the Introductory Submission on crimes committed by the DK Navy seize the Co-Investigating Judges with the capture of “any Thai or Vietnamese vessels” and the capture of all fishermen on board.<sup>314</sup> The International Co-Prosecutor states that he has reason to believe that “many more Thai fishermen were detained by the DK navy. This appears to have been part of a larger policy of kidnapping Thai nationals [...]” and that “[s]ome of these captured Thai fishermen” were sent to S-21. The paragraph refers also to the arrest of scores of Vietnamese persons who were sent from Division 164 to S-21.<sup>315</sup>

208. Having regard to the allegations, the Undersigned Judges are of the view that the Investigating Judges were seised with such persons’ arrest and capture at sea. They were allegedly sent to S-21 and others were sent to other locations which it rested with the Co-Investigating Judges to discover.

209. Whereas said paragraphs of the Introductory Submission make reference to capture at sea, arrests and transfers to certain detention centres, they do not circumscribe the allegations geographically. The Undersigned Judges note that Ream was in a coastal area, where the DK Navy had a considerable presence as the main naval base was there. It follows that the forced labour, detention and execution sites connected to Ream have a direct nexus to capture at sea. It is expedient that the Investigating Judges discover the fate of the captives. Evidence given in the case at bar refers to Vietnamese and Thai fishermen being taken to Ream – the DK Navy headquarters – and subsequently to the durian plantation for execution.<sup>316</sup>

210. Further still, the Undersigned Judges note that from paragraphs 86(a) of the Introductory Submission – alleging that “[redacted] [...] was commander of the DK Navy” and “[h]e was responsible for defending Cambodia’s coast, including [...] Ream [...]” – read together with paragraphs 59 to 61 on the alleged crimes committed by the DK Navy, Ream was perforce inseverable from the factual allegations.

<sup>313</sup> Introductory Submission, paras 59-61.

<sup>314</sup> Introductory Submission, para. 59.

<sup>315</sup> Introductory Submission, paras 59-61.

<sup>316</sup> Written record of interview of Witness [redacted], 24 August 2010, D2/6, p. 9.





211. Paragraph 86(b) of the Introductory Submission lends further support to that analysis in stating that, as Secretary of Division 164, ██████████ was responsible for patrolling the coastline and that his forces were responsible for capturing Thai or Vietnamese vessels.<sup>317</sup>

212. Moreover, another witness spoke of the forced labour exacted of the “former soldiers of Division 164 who were considered to be no-good elements”<sup>318</sup> at the hands of Division 164 itself.<sup>319</sup> Another witness, a former Division 164 soldier,<sup>320</sup> spoke of having been considered a suspicious, no-good element suspect who was therefore put to work in the paddy fields at Ream.<sup>321</sup>

213. From the impugned witness interviews the Undersigned Judges see that the questions put in relation to Ream concern crimes related to Division 164, the Division’s operations, the purges and capture at sea, as set out at paragraphs 52 to 61 of the Introductory Submission. In one such interview, Ream is referred to as one of the places where Thai and Vietnamese captives were brought<sup>322</sup> and is clearly inseverable from the allegations of capture at sea. Furthermore, another witness living in Ream village spoke of daily arrests, including the removal of his neighbour, who was in the navy and a former Lon Nol soldier, at the hands of the Khmer Rouge soldiers,<sup>323</sup> substantiating allegations that soldiers were sent away and may have been executed for their perceived ties to the former regime.<sup>324</sup>

214. In light of all of the foregoing, it is clear that Ream is among the alleged crime sites which were laid before the Co-Investigating Judges. The Co-Investigating Judges were seised of DK Navy crimes and the Division 164 purges. The judicial investigation revealed that some such crimes were committed in Ream – one of the locations where Division 164 operated and also the main naval base. In the view of the Undersigned Judges, it is reasonable to determine that the Co-Investigating Judges were seised of Ream by virtue of the crimes committed by the DK Navy. Accordingly, the Undersigned Judges find that the Ream Application for annulment must be dismissed.

<sup>317</sup> Introductory Submission, para. 86 (b).

<sup>318</sup> Written record of interview of Witness ██████████, 12 November 2013, D54/35, p. 5.

<sup>319</sup> Written record of interview of Witness ██████████, 24 August 2010, D2/6, pp. 7-9.

<sup>320</sup> Notes of interview of Witness ██████████, 25 April 2007, D123/2/3.14a, pp. 2-5.

<sup>321</sup> Written record of interview of Witness ██████████, 21 October 2013, D54/26, p. 5.

<sup>322</sup> Written record of interview of Witness ██████████, 15 August 2014, D54/118, pp. 4-5.

<sup>323</sup> Written record of interview of Witness ██████████, 10 September 2014, D114/3, pp. 4-5.

<sup>324</sup> Introductory Submission, para. 54.



## VI – FORCED MARRIAGE APPLICATION

### A. Submissions of the parties

215. The Co-Lawyers submit that the International Co-Prosecutor has not set forth any facts in his Introductory Submission or Supplementary Submission to indicate that ██████████ may have committed forced marriage as the crime against humanity of other inhumane acts.<sup>325</sup> In their view, whilst the Supplementary Submission sets forth facts alleged to constitute forced marriage as a crime against humanity, it sets forth none to indicate that forced marriage was committed as part of a widespread or systematic attack and establishes no nexus with the armed conflict<sup>326</sup> – elements which, to the Co-Lawyers, are a *sine qua non* condition for an underlying act to constitute a crime against humanity.<sup>327</sup> Hence, ██████████ is the subject of an investigation founded on facts arising from Introductory or Supplementary Submissions but which cannot constitute crimes within the jurisdiction of the ECCC, thus entailing procedural defect. The Co-Lawyers submit that ██████████ rights to a fair trial, to be informed of the charges against him and to be tried within a reasonable time have thereby been violated<sup>328</sup> and so the investigative action connected to forced marriage must be annulled.

216. The International Co-Prosecutor contends that the Co-Lawyers have failed to establish procedural defect since the Co-Investigating Judges rather than the Co-Prosecutors determine the legal characterisation of the facts<sup>329</sup> upon issuance of the Closing Order.<sup>330</sup> He further maintains that Internal Rule 53 does not require that the Introductory Submission be, in every respect, set forth in as much detail as the Co-Lawyers claim. Further, he asserts that the Co-Lawyers seek annulment on the basis of the legal conclusions which they themselves have drawn.<sup>331</sup>

217. In reply, the Co-Lawyers re-state their submissions, underscoring that the International Co-Investigating Judge is investigating facts which do not constitute a crime

<sup>325</sup> Forced Marriage Application, para. 24.

<sup>326</sup> Forced Marriage Application, paras 25, 28-31.

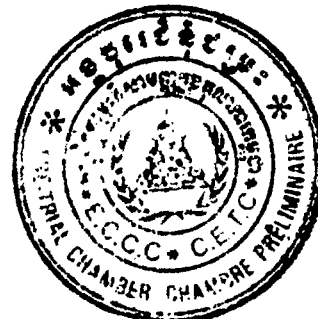
<sup>327</sup> Forced Marriage Application, para. 25.

<sup>328</sup> Forced Marriage Application, para. 33.

<sup>329</sup> Response to Forced Marriage Application, paras 17, 19-20.

<sup>330</sup> Response to Forced Marriage Application, para. 21.

<sup>331</sup> Response to Forced Marriage Application, para. 17.



within the jurisdiction of the ECCC, thereby expanding the judicial investigation.<sup>332</sup>

### B. Consideration of the Merits

218. The Co-Lawyers dispute that the Co-Investigating Judges were duly seised with regard to forced marriage on the ground that the International Co-Prosecutor has not stated the nexus first between forced marriage and the attack and second between forced marriage and the armed conflict. Therefrom the Undersigned Judges conclude that their analysis must concern the criteria for initiation of a judicial investigation of forced marriage. They must adjudge whether, upon filing the Introductory and Supplementary Submissions, the conditions laid down by Internal Rule 53(1) were satisfied, namely whether the International Co-Prosecutor rightly had reason to believe that the crime of forced marriage as the crime against humanity of other inhumane acts may have been committed.

219. The Undersigned Judges recall that the provisions governing introductory and supplementary submissions are found at Internal Rule 53. Internal Rule 53 sets forth two species of rule for a submission to be valid. In its second part, Internal Rule 53(1) prescribes a number of conditions as to the form of an introductory submission. Thus, it shall contain the following information:

- a) a summary of the facts;
- b) the type of offence(s) alleged;
- c) the relevant provisions of the law that defines and punishes the crimes;
- d) the name of any person to be investigated, if applicable; and
- e) the date and signature of both Co-Prosecutors.

220. By contrast, the first part of Internal Rule 53(1) lays down a further condition for validity which may be inferred from the following excerpt: "If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons". This condition is instead substantive. The Undersigned Judges recall that the Internal Rule 53(1) makes explicit that non-compliance with the Rule renders the Submission null and

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<sup>332</sup> Forced Marriage Reply, paras 4, 8, 10.



void;<sup>333</sup> the provision draws no distinction between formal or substantive conditions.<sup>334</sup>

221. That the co-investigating judges are barred from opening a judicial investigation of their own motion entails that the Introductory Submission set forth the facts *sub judice*. That being said, the Undersigned Judges are of the view that the Co-Lawyers have misconstrued the level of detail required of introductory and supplementary submissions. The *summary* of the facts and the type of offence(s) alleged do not signify at this juncture in the proceedings that all of the elements of crimes and the nexuses between them be established by the Co-Prosecutors. In fact, the precision required is not as high as that required of a closing order under Internal Rule 67(2). Were it not so the judicial investigation would be redundant: the precise purpose of said investigation is to ascertain or rule out the reasons which warranted its initiation. The Undersigned Judges consider that the nexuses between the underlying acts and the constituent elements of the chapeau of the crime against humanity need not be substantiated at the stage of initiation of the judicial investigation.

222. The Undersigned Judges further note that a supplementary submission does not rehearse all of the facts and considerations advanced in the introductory submission since the body of the Co-Prosecutors' submissions are laid before the Co-Investigating Judges for consideration. The sole difference between a supplementary submission and an introductory submission is that the former post-dates the latter, which it supplements. Hence, that the Co-Investigating Judges are seised of facts concerning an armed conflict or an attack by virtue of an introductory submission and facts concerning the underlying acts by virtue of a supplementary submission is no impediment to the characterisation of a crime against humanity, if any.

223. The Undersigned Judges are of the view that said Submissions show that the International Co-Prosecutor had reason to believe that forced marriage was one of the means whereby the CPK attacked the population by implementing policies which fundamentally altered Cambodian society and resulted, *inter alia*, in inhumane living conditions.

224. Of note is that paragraph 20 of the Supplementary Submission reads:

As part of the policy of creating revolutionary families and rapidly

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<sup>333</sup> Internal Rule 53(1).

<sup>334</sup> Decision on Two Applications for Annulment, para. 38.



increasing the DK population throughout the country, evidence obtained [...] indicates that Division 164 officials conducted forced marriages in Kampong Som [...].<sup>335</sup>

The subsequent paragraphs depict the circumstances connected to the allegations.<sup>336</sup>

Moreover, the Introductory Submission also states:

Between 17 April 1975 and 6 January 1979, the Communist Party of Kampuchea set out to fundamentally alter Cambodian society on ideological lines through forcible economic and social change. To accomplish this change, the leaders of the CPK implemented policies that resulted in widespread starvation, systematic brutality, inhumane living conditions and the deaths of between 1.7 and 2.2 million people [emphasis added].<sup>337</sup>

225. What is more, the Introductory Submission describes the armed conflict between Cambodia and Vietnam and between Cambodia and Thailand from 1975 to 1979.<sup>338</sup>

226. Accordingly, the Undersigned Judges find that Internal Rule 53(1) conditions are satisfied<sup>339</sup> and that at the time of filing the Supplementary Submission, the International Co-Prosecutor had reason to believe that forced marriage as the crime against humanity of other inhumane acts, as defined by article 5 of the ECCC law, may have been committed. The Undersigned Judges further point out that the legal characterisation of the facts will be determined by the Co-Investigating Judge upon conclusion of the judicial investigation – a determination from which appeal lies.<sup>340</sup> The Co-Prosecutors propound but do not determine legal characterisation. Various facts were brought before the Co-Investigating Judges with whom their legal characterisation will rest, as will the establishment of any nexus between the various elements of the crimes at the Closing Order stage. Thereupon, it will rest with the

<sup>335</sup> Supplementary Submission, para. 20.

<sup>336</sup> Supplementary Submission, paras 21-24.

<sup>337</sup> Introductory Submission, para. 10.

<sup>338</sup> Introductory Submission, paras 28-32.

<sup>339</sup> Internal Rule 53(1)(a) a summary of the facts: Introductory Submission, paras 10, 28-32 and Supplementary Submission, paras 20-24; (b) the type of offence(s) alleged: Supplementary Submission, para. 25; (c) the relevant provisions of the law that defines and punishes the crimes: Supplementary Submission, para. 25; (d) the name of any person to be investigated, if applicable: Supplementary Submission, para. 26; (e) the date and signature of both Co-Prosecutors: *see* Supplementary Submission, p. 17 and Considerations on [REDACTED] appeal against the International Co-Investigating Judge's re-issued decision on [REDACTED] motion to strike the International Co-Prosecutor's Supplementary submission, 26 April 2016, D120/3/1/8 (PTC26).

<sup>340</sup> Considerations on [REDACTED] appeal against the International Co-Investigating Judge's decision to charge [REDACTED] with grave breaches of the Geneva Conventions and national crimes and to apply JCE and command responsibility, Opinion of Judges BEAUVALLET and BAIK, 27 April 2016, D174/1/4 (PTC29).



parties to seek, if need be, a remedy in respect of the Co-Investigating Judges' order, including in respect of the legal characterisations. Accordingly, the Forced Marriage Application for annulment is hereby dismissed.

## VII – WITNESS INTERVIEW APPLICATION

### A. Submissions of the parties

227. It is the Co-Lawyers' submission that the investigators' methods of interviewing witnesses violated the right of ██████████ to a fair trial since the irregularities which vitiate the interviews preclude his examination of the entire evidence on record.<sup>341</sup> That not all of the conversations and interactions between the investigators and witnesses were recorded, in their view, deprives them of the precise context and content of the interviews.<sup>342</sup> They claim not to be in a position to know whether the written records accurately reflect the witnesses' statements. Lastly, they maintain that they are not in a position to ascertain the extent to which the investigators may have influenced the witnesses through the questions they put to them. In their opinion, unless they are privy to all of the factors which may have affected the witnesses' memories, the Co-Lawyers are not in a position to examine all of the evidence against ██████████ and hence mount his defence.<sup>343</sup>

228. The Co-Lawyers set forth the irregularities which vitiate the impugned interviews and assert as follows: (1) Reference is made in ██████████ interview of 20 July 2010 to the witness' statements given in an earlier interview of which there is, however, no audio or video recording.<sup>344</sup> (2) Reference is made in ██████████ interview of 28 July 2010 to statements given during a site visit undertaken by the witness and investigators to Wat Eng Tea Nhien on 27 July 2010. That a report of the visit was made but no audio- or video-recording, the Co-Lawyers submit, leaves them unapprised of all of the information the witness provided that day and of the questions which the investigator put during the visit and which may have impinged on the witness' recollection.<sup>345</sup> (3) Reference is made in ██████████ interview of 23 September 2010 to a visit undertaken by the investigators and the witness to

<sup>341</sup> Witness Interview Application, paras 9-12.

<sup>342</sup> Witness Interview Application, para. 11.

<sup>343</sup> Witness Interview Application, paras 12, 14.

<sup>344</sup> Witness Interview Application, paras 3(a), 12(a)-(b).

<sup>345</sup> Witness Interview Application, paras 3(b), 12(c)-(e).



Security Center 809, but no recording was made, preventing the Co-Lawyers from comparing the statements made with those taken down in the written record of interview.<sup>346</sup> (4) Certain statements made during various site visits by [REDACTED] and the investigators on 9 November 2010 were mistranscribed and do not reflect the written records. The Co-Lawyers take issue with the failure to record, which prevents them from verifying the witness' statements.<sup>347</sup> Further still, the Co-Lawyers contend that when [REDACTED] was interviewed for a second time on 11 November 2011, two references were made to a site visit to the durian plantation, but no corresponding site identification report exists.<sup>348</sup> (5) Reference is made in [REDACTED] interview of 6 March 2012 to an earlier interview and the interpreter states "the day before". To the Co-Lawyers it is unclear whether that reference corresponds to an interview on 5 March 2012. The Co-Lawyers submit that absent a recording of the interview, they cannot assess the information provided or the impact that the witness' interview may have had on his subsequent statements.<sup>349</sup> (6) The Co-Lawyers take issue with the fact that only an audio-recording was made of the written record of interview being read back to Witness [REDACTED], but not the interview in its entirety.<sup>350</sup> (7) In an interview on 1 May 2012, Witness [REDACTED] was asked to answer afresh because the answer had not been recorded. The Co-Lawyers object to the fact that the written record does not faithfully reflect the witness' statements and that the absence of recording does not allow their accuracy to be verified.<sup>351</sup> The Co-Lawyers take further exception to the fact that in that interview [REDACTED] marked on a map the sites to which he had purportedly referred in his interviews. However, the Co-Lawyers point out, two of the marks – Road 22 (now Road 27) and Division 3 in Svay Rieng – are unmentioned in the written records of interview. Hence, the Co-Lawyers maintain, they are not privy to the information provided by the witness.<sup>352</sup>

229. In his Response, the International Co-Prosecutor states that whilst he does not formally contest the admissibility of the application for annulment under Internal Rule 74(3)(g), he would point out that the Co-Lawyers are circumventing Internal Rule 74(3) by appealing the Co-Investigating Judges' discretionary decisions concerning their

<sup>346</sup> Witness Interview Application, paras 3(c), 12 (f)-(g).

<sup>347</sup> Witness Interview Application, paras 3(d) and 12(h)-(n).

<sup>348</sup> Witness Interview Application, para. 3(e).

<sup>349</sup> Witness Interview Application, paras 3(f) and 12(p).

<sup>350</sup> Witness Interview Application, paras 12(q)-(r).

<sup>351</sup> Witness Interview Application, paras 3(h), 12 (s)-(t).

<sup>352</sup> Witness Interview Application, para. 3(j).



investigative modalities.<sup>353</sup> The Co-Lawyers are seeking to move the Pre-Trial Chamber to rule on the obligation to record witness interviews, whereas appeal on such matters is circumscribed by Internal Rule 74. What is more, in the International Co-Prosecutor's view, no procedural defect arises from the absence of recording of the interviews since (i) recording is not mandatory under the Internal Rules; (ii) the absence of recording does not refute the presumption of reliability which, according to the Pre-Trial Chamber and the Trial Chamber, attaches to witness interviews; and (iii) [REDACTED] has not justified why a lack of recording of the interviews violates any of his rights.<sup>354</sup> Lastly, the International Co-Prosecutor maintains that annulment of the written records of witness interviews would not, in any event, be the proper remedy.<sup>355</sup>

## B. Consideration of the Merits

230. The Undersigned Judges will revisit a number of considerations paramount to procedural fairness and the investigation, before turning to the impugned evidence given by the witnesses so as to determine whether the procedural defect alleged is established.

### 1. Audio-visual recording of witness interviews

231. The Internal Rules do not mandate the recording of witness interviews. Internal Rule 25(1) provides: "Whenever possible, when the Co-Prosecutors or Co-Investigating Judges question a Suspect or Charged Person, in addition to the written record of the interview, it shall be audio or video-recorded". The Internal Rule which makes provision for the recording of interviews where possible does not, therefore, concern witness interviews. Internal Rule 25(4), which governs witness interviews, reads: "The Co-Prosecutors or Co-Investigating Judges *may choose* to follow the procedure in this Rule when questioning other persons than those mentioned above [suspect or charged person], in particular where the use of such procedures could assist in reducing any subsequent traumatising of a victim of sexual or gender violence, a child, an elderly person or a person with disabilities in providing their evidence" [emphasis added].

232. Hence the recording of witness interviews is left to the unfettered discretion of the

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<sup>353</sup> Response to Witness Interview Application, paras 10-12.

<sup>354</sup> Response to Witness Interview Application, paras 14-18.

<sup>355</sup> Response to Witness Interview Application, paras 20-24.





Investigating Judge. The Judge is advised only to record interviews of particularly vulnerable persons but not duty-bound. Nonetheless, Internal Rule 55(7) casts a duty on the Co-Investigating Judges to make a written record of every interview. Discharge of such duty to make a written record consistent with the interviewee's statements is further ensured by the reading back of the statement to the said person and his or her signing and fingerprinting of each page.<sup>356</sup>

233. The foregoing Internal Rules on the duty to make a written record of witness interviews mirror Articles 93 and 115 of the Cambodian Code of Criminal Procedure, which lay down:

For each interrogation, a written record shall be established.

The written record shall be an accurate account of the interrogated person's responses. If it is necessary, judicial police officers may use an interpreter/translator who shall take an oath according to his own religion or beliefs. The interpreter/translator shall not be chosen from among the police or military police or any person with a connection to the case.

The interrogated person shall sign or affix his finger-print to each page of the written record.

Before signing or affixing the finger-print on the written record, the interrogated person shall re-read the record. If necessary, a judicial police officer shall read the record aloud. Judicial police officers may call for an interpreter/translator. If the interrogated person refuses to sign or affix his finger-print on the written record, the judicial police officer shall so note on the written record.

234. This procedure, moreover, the Undersigned Judges note, accords with the previous rulings of the Trial Chamber, which on a number of occasions has affirmed<sup>357</sup> that audio-recording is not mandatory:

While the Co-Investigating Judges may directly interview any victim or witness and record their statements in a written record of interview, they may also delegate through a Rogatory Letter the conduct of such

<sup>356</sup> Internal Rule 55(7).

<sup>357</sup> Case 002, Decision on Defence requests concerning irregularities alleged to have occurred during the judicial investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 7 December 2012, E251 ("Decision on Procedural Defect during Judicial Investigation"), para. 16; Case 002, Decision on NUON Chea's request for a Rule 35 investigation regarding inconsistencies in the audio and written records of OCIJ witness interviews, 26 March 2012, E142/3 ("Decision on Inconsistencies between Audio and Written Records"), para. 6.



interviews to investigators from their Office. The investigators shall act under the supervision of the Co-Investigating Judges and shall draw up a written record of their investigations and findings.

The Internal Rules further provide that a written record shall be made of every interview, while envisaging the possibility that the interview in some circumstances be audio or video recorded. Therefore, it is not mandatory to make an audio or video recording of an interview with a witness or a Civil Party.<sup>358</sup>

235. Accordingly, the Undersigned Judges see that audio- or video-recording of witness interviews is not mandatory. In this connection, the Undersigned Judges recall the principle concerning the presumption of reliability which attaches to investigative action, including interviews of witness.<sup>359</sup> The presumption is rebuttable and the Undersigned Judges concur with the Trial Chamber, which has stated that a movant may, nonetheless, challenge the veracity of an interview by establishing that the content of a written record had been altered and by showing that the presumption no longer holds true.<sup>360</sup>

236. That the interviews of Witnesses [REDACTED], [REDACTED], [REDACTED] and [REDACTED] were not recorded does not of itself refute the presumption of reliability which attaches to the interviews. Since written records of the witness interviews in their entirety were made,<sup>361</sup> and having regard to the foregoing principles, the Undersigned Judges do not find the procedural defect established.

237. Further still, as regards the interview of Witness [REDACTED] on 6 March 2012, the Co-Lawyers allege, on account of the reference to an earlier interview and the interpreter's use of the word "yesterday", that an unrecorded interview of the witness took place one day beforehand. The Co-Lawyers submit that absent a recording of the interview, they cannot assess the information provided or the impact that the witness' interview may have had on his subsequent statements.<sup>362</sup> The Undersigned Judges note that in an earlier interview, the

<sup>358</sup> Decision on Inconsistencies between Audio and Written Records, para. 6.

<sup>359</sup> Case 002 (PTC34), Decision on NUON Chea's Appeal Against OCIJ Order on Request for Transcription, 20 April 2012, D194/3/2, para. 21.

<sup>360</sup> Decision on Procedural Defect during Judicial Investigation, para. 22; Decision on Inconsistencies between Audio and Written Records, paras 7, 10.

<sup>361</sup> Written record of interview of Witness [REDACTED], 8 March 2012, D32/4; Written record of interview of Witness [REDACTED], 20 July 2010, D2/3; Written record of interview of Witness [REDACTED], 6 March 2012, D32/2; Written record of interview of Witness [REDACTED], 1 May 2012, D32/13.

<sup>362</sup> Witness Interview Application, paras 3(f) and 12(p).



witness spoke of the purge against “██████████” and the four divisions of the East Zone.<sup>363</sup> The Undersigned Judges further note that in the written record of the witness’ 31 May 2009 interview, reference is made to the circumstances of ██████████ disappearance and the fact that the Zone had four divisions.<sup>364</sup> Hence, in the Undersigned Judges’ view, there is no doubt that “the previous interview” of the witness, adverted to on 6 March 2012, corresponds to the interview of 31 May 2009 and not a different, unrecorded interview held on 5 March 2012, as the Co-Lawyers suggest in their application. The Undersigned Judges find that the considerations raised by the Co-Lawyers do not, therefore, refute the presumption of reliability in this respect and procedural defect is not established.

## 2. Non-verbatim nature of the written records of witness interviews

238. The Co-Lawyers take further exception to the fact that a written record of a witness interview does not reflect the witness’ statements and to the absence of video- or audio-recording against which to verify the statements’ accuracy.<sup>365</sup> Of note is that Internal Rule 55(7) on the duty to make a written record of every interview does not lay down any specific conditions in that regard.

239. The Undersigned Judges share the view of the Trial Chamber that the practice followed in Cambodia does not require written records of interviews to be verbatim records.<sup>366</sup> It suffices for an official from the Office of the Co-Investigating Judges to make a report of the relevant statements given by the interviewee. The Internal Rules mandate that said person read over and sign or fingerprint each page, thereby ensuring that the written record is consistent with his or her statements.<sup>367</sup>

240. Accordingly, the Undersigned Judges do not consider the non-verbatim nature of such a written record to constitute an irregularity. Furthermore, save where wilful distortion of the statements is proven, the presumption of reliability which attaches to investigative action, as aforementioned,<sup>368</sup> means that the written record is presumed to reflect the answers given.

<sup>363</sup> Written record of interview of Witness ██████████, 6 March 2012, D32/2, p. 3.

<sup>364</sup> Written record of interview of Witness ██████████, 31 May 2009, D4.1.449, pp. 2-4.

<sup>365</sup> Witness Interview Application, para. 3(h).

<sup>366</sup> Decision on Inconsistencies between Audio and Written Records, para. 11.

<sup>367</sup> Internal Rule 55(7).

<sup>368</sup> See *supra* paras 235-236.



241. In the opinion of the Co-Lawyers, that an investigator's repetition of a question to a witness – asking him to enumerate [sic] his response for it to be taken down – makes clear that the written statement does not accurately reflect the interview, and so constitutes defect.<sup>369</sup> In the view of the Undersigned Judges, no doubt is cast on the reliability of the witness' evidence by the mere fact that, as the audio-recording makes apparent, the investigator told the witness that he would repeat a question as the answer had not been taken down, making his intention to do so known to the witness. The Undersigned Judges incline to the view that rather than showing that the investigator knowingly and wilfully distorted the witness' answers, that excerpt of the recording shows that the investigator endeavoured to make an accurate record of the witness' statements by asking that the answer be repeated so as to be accurately taken down. Accordingly, the Undersigned Judges find that procedural defect is not established.

### 3. Recording of initial contact with a witness

242. The Co-Lawyers claim that written records or recordings have not been consistently made of all meetings between the investigators and witnesses.<sup>370</sup> Akin to the International Co-Investigating Judge,<sup>371</sup> the Undersigned Judges note that at issue is the initiation of contact between an investigator and a witness in prospect of interview. In this respect, the Undersigned Judges see no provision of the Internal Rules which specifically governs such contact. The Undersigned Judges observe that on 29 September 2015, the International Co-Investigating Judge issued instructions to investigators on initial contact with witnesses by restricting the content of authorised contact and requiring the recording of the conversation in an investigative action report.<sup>372</sup> The Co-Investigating Judges had hitherto instructed investigators to record in written records of investigative action all contacts with witnesses and potential witnesses.<sup>373</sup> No duty cast on investigators foresees the audio- or video-recording of such initial contact.

243. Internal Rule 60 mirrors Article 153 of the Cambodian Code of Criminal Procedure,

<sup>369</sup> Witness Interview Application, paras 3(h) and 12(t).

<sup>370</sup> Witness Interview Application, paras 3(a) and 12(a)-(b).

<sup>371</sup> Impugned Decision, para. 40.

<sup>372</sup> Memorandum, Instructions on screening of civil parties and other witnesses and on the format of the *procès-verbal*, 29 September 2015, D157.

<sup>373</sup> Memorandum, Instructions on conduct of witness interviews, 3 December 2012, D61.



which makes provision for an Investigating Judge to take statements from any person whom they consider conducive to ascertaining the truth. Determination of the conduciveness of a person's statements entails confirmation of the person's identity, a cursory appraisal of his or her knowledge in connection with the facts of the case, and scheduling of the interview. A decision whether to question a witness is made after such contact and confirmation of identity, whose recording is not required by law. The Undersigned Judges consider, moreover, that it could in practice be counter-productive to make an audio- or video-recording of initial contact with witnesses as it could alarm them and deter them from giving evidence. That the recording of such initial contact is not mandatory does not violate the rights of the defence since investigators proceed under the oversight of the Co-Investigating Judges and in accordance with their instructions pursuant to Internal Rule 62. The Undersigned Judges recall the presumption of reliability which attaches to investigative action<sup>374</sup> and the fact that the onus rests with the movant to prove that the presumption no longer applies. Lastly, the Undersigned Judges would note that the audio- or video- recording of interviews has long since not been governed by specific instructions, and, therefore, such recording of initial contact with witnesses is even less so.

244. The Undersigned Judges are of the further view that Co-Lawyers' allegations regarding Witness ██████ amount to speculation.<sup>375</sup> By misrepresenting the investigators' statements, the Co-Lawyers are seeking to portray an initial meeting with a witness as an unrecorded interview. Upon consideration of the impugned interview, the Undersigned Judges are of the view that the Co-Lawyers do not advance anything to refute the presumption of reliability; nor do they establish that a person knowingly and wilfully sought to obstruct the judicial process during the initial contact between the investigators and witnesses.

#### 4. Audio-visual recording of the site visits

245. The Co-Lawyers claim that many site visits were undertaken in the witnesses' presence absent audio-visual recording. And so, they maintain, they cannot know the

<sup>374</sup> See *supra* paras 235-236.

<sup>375</sup> Witness Interview Application, para. 3(a).

circumstances of the visits and the exact statements made by the witnesses.<sup>376</sup>

246. Of note is that Internal Rule 55(8) reads:

The Co-Investigating Judges may make on-site visits to conduct any investigation they consider useful. They shall be accompanied by their Greffiers, who shall make a written record for the case file. The Co-Investigating Judges may inform the parties of such visits, where their presence may be necessary.

247. The Internal Rule mandates a written record of a Co-Investigating Judges' site visit but in no way prescribes its audio- or video-recording. The Co-Investigating Judges must provide a detailed report to apprise the parties of the circumstances of the visit. This modus operandi is consonant with the practice of countries which follow an inquisitorial model. The Undersigned Judges consider that, in accordance with Internal Rule 55(8), where the investigator provides a written record of investigative action on the site visit with the witness, the rights of the movant are not in any way violated.

248. The Undersigned Judges will now review the impugned visits undertaken by the investigators with certain witnesses. Firstly, Witness [REDACTED] allegedly made a visit with the investigators to Wat Eng Tea Nhien on 27 July 2010, which, the Co-Lawyers maintain, was not filmed or recorded, thus leaving them unapprised of all of the conversations between the investigators and the witness as they walked around the site.<sup>377</sup> The Undersigned Judges further note that the written record of interview of 28 July 2010 makes reference to the site visit.<sup>378</sup> This visit is further detailed in the the site identification report for Wat Eng Tea Nhien, where the places shown by the witness are mentioned, including the burial site, the location of the fence, the perimeter of the monastery and the buildings' interior.<sup>379</sup> Since the Internal Rules do not mandate recording and the Co-Lawyers raise nothing to cast any doubt on the reliability of the report,<sup>380</sup> the Undersigned Judges are of the view that there is no irregularity to constitute procedural defect.

249. Second, in the Co-Lawyers' submission, the fact that the written record of [REDACTED]

<sup>376</sup> Witness Interview Application, paras 3(b)-(d), 12(c)-(n).

<sup>377</sup> Witness Interview Application, paras 12(c)-(e).

<sup>378</sup> Written record of interview of Witness [REDACTED], 28 July 2010, D2/4, question 1.

<sup>379</sup> Site Identification Report, Marine Division 164 Site, Wat Enta Nhien security center, D2/22 ("Site Identification Report for Marine Division 164 Site").

<sup>380</sup> Witness Interview Application, paras 3 (b), 12(c)-(e).



interview is also a record of the investigators and the witness' exchanges during a visit that same day to Security Center 809 precludes their verification of the accuracy of statements which the witness may have made during the visit. The Undersigned Judges note that the circumstances of the visit and the witness' comments at the time are set down at the start of the written record of witness interview.<sup>381</sup> Of note is that the investigators asked the witness to confirm the accuracy of the statements which they had taken down,<sup>382</sup> thus ensuring that they were faithfully recorded in writing. The Co-Lawyers raise nothing to cast any doubt on the reliability of the information, but claim only that they cannot compare the information in the written record with that provided by the witness.<sup>383</sup> According to the aforementioned presumption of regularity which attaches to investigative action,<sup>384</sup> the written record is presumed to reflect the answers provided by the witness and the mere fact of not being able to compare them with the recording does nothing to refute the presumption. The Undersigned Judges find that the procedural defect alleged in respect of this interview is not established.

250. The Co-Lawyers go on to assert that the evidence given by [REDACTED] raises different problems.<sup>385</sup> First, the Co-Lawyers submit that they cannot compare the statements the witness gave during the site visits since no audio- or video-recording was made.<sup>386</sup> Further, they allege that the investigators and the witness' discussion of substantive matters during the visit is not on record as their conversations were not taken down. They take issue with the fact that in the site identification report for Wat Eng Tea Nhien, the witness points out various houses or refers to the circumstances of the arrest of the chief of Wat Eng Tea Nhien, whereas no reference to such statements appears in any written record of the witness' interview.<sup>387</sup>

251. The Undersigned Judges note that the movant is at liberty to avail himself of the site identification report describing the witness and investigator's visit. As the preceding analysis makes clear,<sup>388</sup> a written record of investigative action is the sole mandatory requirement and no procedural defect ensues from the absence of recording.

<sup>381</sup> Written record of interview of Witness [REDACTED], 23 September 2010, D2/11, questions 3-27.

<sup>382</sup> *Ibid.*

<sup>383</sup> Witness Interview Application, paras 3(c), 12(f)-(g).

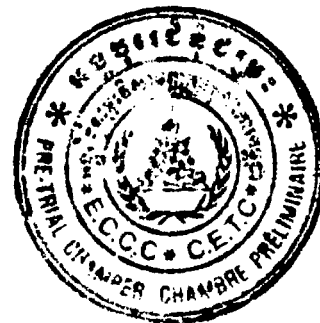
<sup>384</sup> *See supra* paras 235-236.

<sup>385</sup> Witness Interview Application, paras 3(d)-(e), 12(h)-(n).

<sup>386</sup> Witness Interview Application, para. 12(n).

<sup>387</sup> Witness Interview Application, para. 12(j).

<sup>388</sup> *See supra* para. 247.



252. The site identification report for the Division 164 security centre of Wat Eng Tea Nhien, it should be noted, is in several parts. The site is introduced by way of its presentation in the Introductory Submission, and further described through the results of the judicial investigation, various documents and witness interviews, including [REDACTED] interview. The investigators then proceed to particularise the geographical findings regarding the site, as made in the presence of the two witnesses, one of whom was [REDACTED], and who had a part in locating the site on 9 September 2010.<sup>389</sup> For example, they explain how the site operated and its security.<sup>390</sup> The investigators advert to several of the accounts which [REDACTED] gave that day of the inner compound, the detention sites, the first monk house and the second monk house.<sup>391</sup> Photographs which were taken in the course of the visit with the witness appear in the report.<sup>392</sup> The Undersigned Judges note that acting in accordance with Internal Rule 55(8), the investigators report the witness' description of the site and instances when he stated that he could not provide information, for example, in relation to the eating hall and one specific burial site.<sup>393</sup> The Undersigned Judges do not regard it as irregular that a witness was able expound on a site in greater detail in situ than when interviewed. That the particulars which the witness furnished are not identical to those in the written records of interviews and in the report of the site visit undertaken with the witness is, therefore, not irregular. The Undersigned Judges however consider that the investigators were nonetheless duty-bound to give an account of the witness' observations made throughout the visit which they set down in their report.

253. The Undersigned Judges consider that the fact that the investigator stated that the witness did recall the sites and his experiences there and that during the visit the witness imparted details which he did not when interviewed casts no doubt so as to refute the presumption of reliability which attaches to the report. The Co-Lawyers have not, in this instance, identified anything to refute the presumption.

254. The Co-Lawyers further submit that the witness stated that he had shown the investigators the location of the durian plantation, for which, however, there is no dedicated

<sup>389</sup> Site Identification Report for Marine Division 164 Site, p. 12.

<sup>390</sup> Site Identification Report for Marine Division 164 Site, pp. 5-7.

<sup>391</sup> Site Identification Report for Marine Division 164 Site, pp. 15-17.

<sup>392</sup> Site Identification Report for Marine Division 164 Site, p. 29.

<sup>393</sup> Site Identification Report for Marine Division 164 Site, pp. 18-19.





site identification report.<sup>394</sup> From the written record of interview of 11 November 2010, the Undersigned Judges note that the witness identified the durian plantation from the roadside whilst travelling by car with the investigators.<sup>395</sup> Having regard to the witness' answer and Internal Rule 55(8), the Undersigned Judges are of the opinion that a dedicated site visit report for the plantation, as advocated by the Co-Lawyers, was unnecessary. The procedural defects alleged are thus unfounded.

255. Lastly, the Co-Lawyers point out that reference was made at an interview on 10 November 2010 to a site visit undertaken with a witness on 9 November 2010,<sup>396</sup> whose results were to be appended to the written record of interview but of which there appears to be no trace. The written record of the interview states that the witness "joined [the investigators] to do the sites identifications", identifying Wat En Ta Nhien, the naval base in Ream, the Durian plantation, Au Chheu Teal beach and the movie theatre in Preah Sihanoukville.<sup>397</sup> The document goes on to say: "The Results of the yesterday sites identifications, which we will talk more about them next, will be attached with this interview."<sup>398</sup>

256. The Undersigned Judges note that one of the site identification reports does refer to a site visit to Wat Eng Tea Nhien with Witness [REDACTED], but it took place on 9 September 2010 and the report makes no reference to the other sites adverted to in the aforementioned interview.

257. Moreover, the "Recapitulative list of documents", which lists the written record of interview of [REDACTED] contains five site identification reports, including one for Wat Eng Tea Nhien.<sup>399</sup> This document is alone in stating that [REDACTED] was present. None of the documents refer to the five other sites identified with the witness in situ.<sup>400</sup> Further still, the Undersigned Judges note that several documents were appended to the witness interview<sup>401</sup>

<sup>394</sup> Witness Interview Application, para. 3(e).

<sup>395</sup> Written record of interview of Witness [REDACTED], 11 November 2010, D2/16, question 32.

<sup>396</sup> Witness Interview Application, para. 3(e) and 12(i).

<sup>397</sup> Written record of interview of Witness [REDACTED], 10 November 2010, D2/15, p. 4.

<sup>398</sup> *Ibid.*

<sup>399</sup> Recapitulative list of documents, D2/1.1.

<sup>400</sup> Site identification report for Security Centre 809, 4 November 2010, D2/19; Site identification report for Au Cheng Sector Prison, 4 November 2010, D2/20; Site identification report for S-22 Security Centre, 9 December 2010, D2/21; Site identification report for Marine Division 164: Stung Hav rock quarries and related sites, 30 December 2010, D2/23.

<sup>401</sup> List of arrestees from Division 164, D2/16.1; List of fighting forces dated 27/10/1976, D2/16.2; Confession



but none address the sites where identification was undertaken with the witness.

258. The Undersigned Judges note that the written record refers to “[t]he Results of the [...] sites identifications”, which were not appended to the written record of the witness’ interview. The absence of such a site report appears therefore to establish procedural defect, notice having been given that the report would be appended.<sup>402</sup> Failure to append violates the rights of the Charged Person to notice of the body of evidence laid against him. Be that as it may, the Undersigned Judges do not consider annulment of the written record to be the proper or warranted remedy in this instance. Procedural defect in fact arises from the absence of a document on record and not from an inherent defect which would justify annulment of the investigative action. The written record of interview which refers to the missing document is not vitiated.

259. After careful inquiry, the Undersigned Judges remain unable to trace the impugned site identification results. Accordingly, it discerns an irregularity occasioned by failure to append the results of the visit to the written record, whereas the investigator had given notice of their inclusion.<sup>403</sup> It behoves the Co-Investigating Judges to act as guarantors of the integrity of their proceedings. The Undersigned Judges hereby invite the International Co-Investigating Judge to regularise *ex officio* the proceedings by appending the identification results to the written record of witness interview. Failing this, it will rest with parties to request investigative action, from which appeal lies in case of refusal.

##### 5. Marking of two places which were unmentioned in a written record of witness interview

260. The investigators asked Witness ██████████ to mark on a map the places of which he had spoken in his three interviews. The Co-Lawyers maintain that some marks do not correspond to any reference in the written records of his interviews.<sup>404</sup> The two marks, in the Co-Lawyers’ opinion, are Road 22 and Division 3 in Svay Rieng.<sup>405</sup>

261. The Undersigned Judges undertook a meticulous analysis of the impugned evidence given by the witness. As to the first mark on the map concerning Division 3 in Svay Rieng,

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S-21 de ██████████, D2/16.3; Report by secret telephone dated 15/09/1977, D2/16.4.

<sup>402</sup> Written record of interview of Witness ██████████, 10 November 2010, D2/15, p. 4.

<sup>403</sup> *Ibid.*

<sup>404</sup> Witness Interview Application, para. 3(j).

<sup>405</sup> Witness Interview Application, paras 3(j), 12(s)-(t).



the Undersigned Judges note that during the interview of 1 May 2012 the witness stated that he had attended specialised military medical training in Svay Rieng Province.<sup>406</sup> He also said that in 1976 his unit was under the command of Division 4 and that he was in higher education in 1976 in Kampong Cham province. Accordingly, the Undersigned Judges consider that the witness' marking at the bottom of the impugned map of the position of Divisions 3 and 4 in two provinces with which he was well-acquainted, Svay Rieng and Kampong Cham, bears a direct connection to the answers he gave on 1 May 2012.

262. Moreover, the Undersigned Judges note that according to Witness [REDACTED]: "Division 4 was [...] with troops deployed along the border until National Road 22 opposite Vietnam. Nevertheless, I was not sure where the deployment began; I just learned that its operational areas were around Road 22, stretching to Dar village".<sup>407</sup> The Undersigned Judges further note Witness [REDACTED] explanation that he worked in Division 4 the East Zone: "my medical unit, which was under Division 4 [...]".<sup>408</sup>

263. To the Undersigned Judges it, therefore, appears justifiable that the witness spoke of Road 22 and marked "[l]ocations [...] related to Division 4" when asked to mark the places to which he had referred when interviewed. Accordingly, the alleged procedural defect is not established.

264. For the foregoing reasons, the Undersigned Judges would:

**FIND** that the International Co-Investigating Judge rightly declined to refer the Witness [REDACTED] Application;

**DENY** the Kratie, Kang Keng, Tuek Sap, Ream, Forced Marriage and Witness Interview Applications for annulment as without merit;

**INVITE** the International Co-Investigating Judge to regularise the proceedings by appending the identification results to the written record of witness interview D2/15.

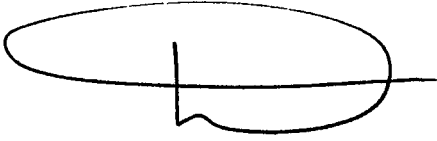
<sup>406</sup> Written record of interview of Witness [REDACTED], 1 May 2012, D32/13, answer 2.

<sup>407</sup> Written record of interview of Witness [REDACTED], 6 March 2012, D32/2, answer 7.


<sup>408</sup> Written record of interview of Witness [REDACTED], 1 May 2012, D32/13, p. 3, answer 2.



Phnom Penh, 13 September 2016



Olivier BEAUVALLET



Kang Jin BAIK

